

No. 05-693 NOV 25 2005

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IN THE

**Supreme Court of the United States**

STEPHEN V. CRAIG AND UN SUN H. CRAIG, PETITIONERS

*v.*

DIANE COX BASHEER COMMUNITIES, INC.; EDGEMOORE  
HOMES, LLC;  
BASHEER/EDGEMOORE-SOUTHAMPTON, LLC;  
BASHEER/EDGEMOORE-WESTHAMPTON, LLC;  
AND BASHEER & EDGEMOORE, A VIRGINIA GENERAL  
PARTNERSHIP,

*PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF VIRGINIA*

**PETITION FOR A WRIT OF CERTIORARI**

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**Question Presented**

Did the Virginia state courts deny the petitioners due process of law when they unexpectedly and without fair warning repudiated a state statute which recognizes the liability of a partnership created by estoppel thereby denying the petitioners a hearing on their claims that the respondents, acting collectively as a purported partnership under Virginia law, breached their contract to build them a home, violated the Virginia Consumer Protection Act and committed fraud in doing so?

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### **Citations of Opinions and Orders.**

The unpublished opinion of the Supreme Court of Virginia, decided and filed June 28, 2005, in *Stephen V. Craig et al. v. Basheer & Edgemore et al.*, Docket No. 050605, affirming the Virginia Circuit Court's orders sustaining the Respondents' demurrers to the Petitioners' complaint, is set forth in the Appendix hereto(App. 1).

The unpublished Order of the Circuit Court of Fairfax County, Virginia, in *Stephen V. Craig et al. v. Diane Cox Basheer Communities, Inc. et al.*, Law No. 220180, dated December 28, 2004, dismissing Count One of the Petitioners' complaint, is set forth in the Appendix hereto(App. 2).

The unpublished Order the Circuit Court of Fairfax County, Virginia, in *Stephen V. Craig et al. v. Diane Cox Basheer Communities, Inc. et al.*, Law No. 220180, dated December 9, 2004, sustaining demurrers to the Petitioners' complaint, is set forth in the Appendix hereto(App. 3).

The Petitioners' first amended motion for judgment (or amended complaint) in *Stephen V. Craig et al. v. Diane Cox Basheer Communities, Inc. et al.*, Law No. 220180 is set forth in the Appendix hereto(App. 4-31).

Excerpts of the Petitioners' Home Inspection Report, dated December 10, 2004, is set forth in the Appendix hereto(App. 32- 48).

### **Basis for Jurisdiction in this Court.**

The decision of the Supreme Court of Virginia, the State court of last resort having jurisdiction to review the decisions of all inferior courts, affirming the Virginia Circuit Court's orders sustaining the Respondents'

demurrers the Petitioners' complaint and dismissing a remaining count, was decided and filed June 28, 2005(App. 1).

On September 23, 2005, this Court, Thomas, J., in *Stephen V. Craig et al. v. Basheer & Edgemoore et al.*, Docket No. 05A267, extended the time for the filing of the Petitioners' petition for writ of certiorari until November 25, 2005.

This petition for writ of certiorari is filed within the extension of time allowed by this Court.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1257(a).

### **Constitutional, Statutory and Rule Provisions Implicated by This Petition.**

United States Constitution, Amendment XIV, Section 1:  
Virginia Code Section 50-73.88(A):  
Virginia Code Section 50-73.97(A), (B), (D)(2) & (E):  
Virginia Code Section 50-73.98. Liability of a purported partner:

(See Appendix)

### **Statement of the Case.**

The respondent Basheer & Edgemoore ("B & E") is a Virginia general partnership which in its advertising, marketing and operation, holds itself out to the general public as an entity which specializes in the construction, sales and financing of luxury residential homes in suburban Virginia.

B & E consists of at least four other partners in this enterprise: the respondent Diane Cox Basheer Communities, Inc., a Virginia corporation with a fictitious

trade name of Diane Cox Basheer Communities ("Diane Cox"); the respondent Edgemoore Homes, LLC, a Virginia limited liability company with a fictitious trade name of Edgemoore Homes ("Edgemoore Homes"); the respondent Basheer/Edgemoore-Southampton, LLC, a Virginia limited liability company operating under the trade name Basheer & Edgemoore ("B & E"); and the respondent Basheer/Edgemoore-Westhampton, LLC, a Virginia limited liability company operating under the trade name Basheer & Edgemoore ("B & E").

In the 1999 and spring of 2000, the petitioners Stephen V. Craig and Un Sun H. Craig ("the petitioners") were shopping for a new home in suburban Virginia. In its advertising brochures and general marketing of a new development in Springfield, Virginia, the respondent B & E held itself out to be a partnership of the respondents Diane Cox and Edgemoore Homes doing business under the name of B & E. The petitioners responded to this marketing by B & E. Eventually, on May 20, 2000, they entered into an agreement with B & E for the purchase of a new home to be constructed by B & E at 7545 Laurel Creek Lane in Springfield. The parties to the purchase and sale agreement executed were the petitioners as the buyers and the respondent Basheer/Edgemoore-Southampton, LLC, a member of the B & E general partnership, as the seller; Diane Cox Basheer and the petitioners signed the contract.

Prior to signing the agreement, the petitioners communicated with B & E about the respondents Diane Cox and Edgemoore Homes and the details of the home they were buying. The petitioners inspected at least two models that the respondents built and examined the neighborhood of these models. They told B & E's agent about their requirements as to price and the topography of the lot, i.e., they wanted to pay no more than \$495,000

and desired privacy and a large, flat terrain for their front, side, and back yards. B & E's agent steered them to Lot No. 36 on Laurel Creek Lane and promised that the existing slopes on the lot would be leveled and that trees would be planted to insure privacy. The petitioners paid an additional \$5,000 for trees and privacy. As far as price was concerned, B & E's agent did not tell the petitioners that there would be any additional costs associated with these "upgrades."

B & E's agent also denied the petitioners their choice of the model home they had selected citing B & E's prohibition against the proximity of the similar models in the same neighborhood next to each other. Yet they later discovered that three of these same models were located their neighborhood next to each other. They also wanted a side sunroom and garage on either Lots Nos. 8 or 9; and B & E represented that side sunrooms could not be built on those lots, suggesting instead that Lot No. 36 would be preferable. Yet houses were later built for other purchasers on Lots Nos. 8 and 9 with these very side sunrooms and without slopes/hills.

B & E also promised the petitioners that no pine trees would be planted adjacent to their lot and that the common area behind Lot No. 36 would be landscaped by planting shrubs and bushes instead of just grass. It further promised them that their home would be constructed with the same characteristics of B & E's model home they had inspected; that it would contain the same materials, the same standard of workmanship and the same quality and style as B & E's model home.

In reliance upon all of these representations by B & E's agents and employees, the petitioners entered into the purchase and sale agreement for their new home on Lot No. 36 at 7545 Laurel Creek Lane in Springfield, for a total sum of \$610,833.00, an amount which was at least



\$115,833.00 more than they would have paid if they had purchased the home which they had originally wanted. Incident to their purchase, the petitioners were given B & E's Home Warranty which was to protect their home against defects in workmanship, material and design for a period of one year after the closing. The Warranty also promised the petitioners a re-inspection 90 days after the closing and an end-of-year "walkthrough" inspection.

When the agreement was executed on May 20, 2000, Basheer/Edgemoore-Southampton, LLC, B & E's partner, was not licensed in Virginia as a home contractor; and it was not so licensed until February 9, 2001, when construction was well underway. Prior to its licensing as a home contractor, Basheer/Edgemoore-Southampton, LLC relied upon the contractor's license of its partner, the respondent Basheer/Edgemoore-Westhampton, LLC, another partner of B & E, in order to obtain the building permits and begin work on the petitioners' house consistent with the agreement. Both of these partners share employees and officers with one another while operating under the name of B & E. The closing on this purchase and sale agreement was to take place within one year of May 20, 2000, when construction of the home was to be completed by B & E.

After the purchase of their house, the petitioners were now told by B & E that their home, unlike the model upon which they relied in making their purchase, would not contain a so-called "bonus" room. In addition, even though other homeowners were allowed to do so, the petitioners were told by B & E that they could not visit their lot prior to the closing and that they would trespassing if they did so. Even from afar, however, they could see that the back of Lot No. 36 had not been landscaped as promised; it remained sloped and hilly with grass and provided no privacy.

When the petitioners communicated these concerns to B & E's agent during the course of the construction, B & E assured them that once construction was completed there would be no significant slope in their back yard and that additional trees would be planted there for their privacy. When these obvious problems with the lot's slope remained and unexpected additional upgrade costs arose, the petitioners in July of 2000 asked B & E to release them from the agreement, telling B & E that they would rather lose their deposit monies than go through with a purchase with which they would not be happy. B & E refused to discuss terminating the agreement, telling the petitioners that "no one backs out," even though the petitioners subsequently discovered that other purchasers were given an option to build their homes on other lots in similar circumstances. There were also pine trees planted next to the lot, contrary to B & E's assurances that no such trees would be planted.

As the closing in May of 2001 approached and the slope and above-ground utility poles remained unaddressed, B & E's building operations manager in March or April of 2001 told the petitioners that B & E would make the right side of the yard "at least walkable" and that the right side of the rear yard would be the flattest part. B & E further promised the petitioners that its crew would work on the slope issues in the back yard and that sod would not be laid until the petitioners agreed with the topography. None of these things was accomplished before or after the closing on May 8, 2001, as B & E had promised the petitioners.

After the closing, the petitioners moved into the home and immediately discovered that the home B & E sold to them was of a grossly inferior quality compared to the model and samples shown them which prompted their purchase in the first place. In June of 2001, B & E's



superintendent of construction told them that the home was sold to them two months earlier and that B & E rushed its construction of the house in an attempt to have it completed within one year from the date of the signing of the agreement in May of 2000.

As a result of this rushed construction and fraud, there were numerous leaks from pipes, the roof, and other areas in the house. Numerous "upgrades" sold to the petitioners by B & E for their home were either scratched or chipped, installed in the wrong place, sometimes with the wrong materials or with materials which were inferior in quality to the materials B & E promised would be installed. The petitioners' 90-day walk-through inspection conducted on September 26, 2001, produced a discrepancy checklist of *over 175* instances of shoddy, inferior workmanship; the installation of inadequate or inappropriate material; and blatant design defects. Broken, chipped wood; substandard drywall, molding, caulking and painting; numerous leaks; missing wood; water faucets switched from cold to hot; a missing pipe cover that required removal of a bathroom sink and which caused mold; removal of tile after the sink removal; relocation of the basement toilet due to code-related violation which took five days for its relocation; three missing medicine cabinets; the main entrance, powder room, and closet doors were not work properly; and countless other examples of inadequate or negligent finish work left the unmistakable inference that there had been a systemic breakdown in the supervision of the construction of this house.

On November 30, 2001 and March 13, 2002, after B & E had attempted to repair some of its faulty construction, the petitioners wrote B & E detailing the items which still needed to be corrected and repaired as well as many other concerns describe din this petition.

The petitioners also did not receive "upgrades" for which they had paid, e.g., 9-foot basement walls, etc. Nor did they receive a home consistent with B & E's own specifications, i.e., the sub-flooring was stapled rather than nailed and/or screwed down; the floor joist system was dramatically deficient—and sometimes completely absent—producing noises/squeaking upon any movement; and there were no 9-foot ceilings. The promised Radon mitigation system *was never installed and then this fact was concealed from the petitioners*. The basement sump pump was defective producing a toxic smell which had to be remedied by the petitioners themselves.

In addition, the basement bathroom had leaks and there were numerous other leaks from sinks, pipes, and the roof, producing unhealthy mold in the house and causing metal to be rusted. The "upgraded" fireplace was mistakenly installed near the stairway; the "upgraded" granite counter tops were chipped and defective; the "upgraded" ceramic tiles in the kitchen were cracked causing dust. The air conditioning was broken; the "upgraded" main Oak stair was in code violation with missing carpet, causing Mrs. Craig to almost fall down at least twice; the hardwood floors were not the quality product which B & E advertised and for which the petitioners paid extra; missing piece of carpet pads under the Basement carpet in several areas that requires to lift the entire carpet for installation of missing pads; one of walls in the back yard is too low (code-related violation). B & E refused to fix the stated problems and many other problems not listed here. The "upgraded" kitchen island granite slab was too small which required its replacement; and the "upgraded" kitchen granite island was installed near the stove which required relocation.

As for the home's landscaping, the petitioners

claimed that huge slopes still remained in the front, side, and back yards and that B & E's installation of the drainage system was faulty causing the landscape to be "washed out." Mrs. Craig ended up in the emergency room for several hours due to severe breathing problems caused by an allergy reaction when she attempted to help her spouse correct the washed out landscaping which B & E refused to fix. In addition, the utility poles were installed above ground instead of below ground.

In all, the petitioners asserted that B & E ordered and installed the wrong materials; denied them certain "upgrades" for which they paid and to which they were entitled; charged them for other "upgrades" for which other homeowners did not pay; failed to provide them with materials and workmanship that other homeowners received; and created new damage during the course of some attempted repairs and then refused to fix the new damage. They requested an additional walk-through of their property before the scheduled one-year walk-through in order to address these problems but B & E refused this request.

When B & E still refused to repair these itemized problems, the petitioners found it necessary to write B & E once more on March 13, 2002, prior to the final walk-through, reiterating with precision the "endless" construction problems, B & E's unfair and unequal treatment, its refusal to correct the problems which they had already identified and restating their request to B & E to address the problems. The petitioners encountered physical and emotional problems by the ongoing inability of B & E to respond to the problems in their home. Specifically, the mold, dust and dirt associated with water leakage and construction defects; the absence of a radon mitigation system when radon levels were four times beyond healthy levels; the smell caused by the faulty

sump pump; the dust particles from the cutting and cracking ceramic tiles; and the work caused by the replacement of the kitchen island and the continued presence of workers in the house for extended periods of time have left Mrs. Craig with severe emotional distress, severe allergic reactions (she almost died due to breathing problems), a precancerous growth which required surgery, a persistent cough for almost two years, and a noticeable loss of hair.

As the Mrs. Craig concluded in her letter to B & E:

I did not receive equal opportunity from Basheer and Edgemoore. Since July of 2000, I have suffered with stress and illness because of...problems with the house. My request was denied in selecting the model [of house] I wanted. My request was denied to obtain the lot that I wanted. My request was denied for the company to build the wall to reduce the slope of the backyard, to avoid accidents from people falling down, and to potential flooding; my request was denied for the company to reduce the slope on the side and front yard. And my request for the company to fix [the] many problems as we (myself and my spouse) stated in two walks-through was denied.

Instead of responding to the petitioners, B & E appeared at the one-year walk-through on May 3, 2002, and without any notice to petitioners refused to conduct the inspection unless the petitioners waived in writing all their rights under B & E's Home Warranty. The petitioners refused to do so and presented B & E with a punch list of 62 separate construction defects prepared by a certified home inspector. B & E declined to consider this punch list and refused to perform any more repair work

on the petitioners' home.

Subsequently, the petitioners discovered that B & E's faulty installation of the floor joist system, a pervasive, fundamental defect which continues to cause repeated cracking of drywall and tilting, and noises/squeaking upon movement throughout the home, was not in conformance with the architectural drawings it submitted to Fairfax County. Nor did B & E install the Radon mitigation system as promised; ***and it took affirmative steps to conceal this important fact from the petitioners*** even though measured Radon levels are four times the maximum allowable safe levels as established by the EPA.

Furthermore, the petitioners commissioned home inspections on May 15, 2003, June 17, 2003, and December 6, 2004. These serial inspections confirmed the systemic failure by B & E to construct the petitioners' home in a safe and workmanlike manner(App. 32-48). Besides identifying 174 separate failures by B & E to adhere to acceptable standards in home building, the certified home inspector found ***over 130 building code-related defects*** in the petitioners' home(App. 34-48).

Faced with B & E's continued refusal to remedy any of these code-related defects, indeed any of the identified problems at all, the petitioners began a civil action against B & E and its partners in the Circuit Court of Fairfax County(App. 4-31). According to their allegations, amended on August 16, 2004, B & E is a Virginia general partnership which in its advertising, marketing and operation, holds itself out to the petitioners as well as to the general public as an entity which specializes in the construction, sales and financing of residential homes in suburban Virginia(App. 5-7). Its partners in this enterprise consist of at least: the respondent Diane Cox Basheer Communities, Inc., a



Virginia corporation with a fictitious trade name of Diane Cox Basheer Communities ("Diane Cox"); the respondent Edgemoore Homes, LLC, a Virginia limited liability company with a fictitious trade name of Edgemoore Homes ("Edgemoore Homes"); the respondent Basheer/Edgemoore-Southampton, LLC, a Virginia limited liability company operating under the trade name Basheer & Edgemoore ("B & E"); and the respondent Basheer/Edgemoore-Westhampton, LLC, a Virginia limited liability company operating under the trade name Basheer & Edgemoore ("B & E") (App.5-6).

The petitioners further alleged that this partnership among B & E, Diane Cox, and Edgemoore Homes constitutes *a Virginia general partnership by estoppel*, doing business under the trade name of B & E since in their advertising, marketing, construction, sharing of employees, sharing of contractor licenses and their prolific and consistent use of the trade name "B & E," these entities held themselves out to the petitioners and to the general public as purported partners of the general partnership of B & E operating under the trade name of B & E(App. 5-7). Furthermore, in reliance upon Diane Cox and Edgemoore Homes, as well as B & E's holding itself out to them and to the public as a general partnership trading under the name of B & E, the petitioners alleged that they "entered in to a contract with the general partnership" of B & E on May 20, 2000 for the construction of their new home(App. 6-7). As the petitioners further alleged, in subsequent written communications with them of May 24, 2000, April 13, 2001, and May 3, 2001, both Diane Cox and Edgemoore Homes represented themselves as purported partners of the general partnership B & E(App. 7).

Alleging all of the facts already recited in this petition and appending exhibits of the relevant

documents to their pleading, the petitioners then claimed in Count I of their First Amended Motion for Judgment that on May 20, 2000, relying upon the existence of this general partnership of B & E, as well as Diana Cox and Edgemoore Homes, they entered into a contract for the purchase of their new home with the respondent Basheer/Edgemoore-Southampton, LLC, a member of the B & E general partnership(App. 8-17). The contract contained an express one-year Home Warranty by B & E that the home B & E built for them would be free from defects in workmanship and material and that inspections conducted both 90 days and one year after closing would guarantee compliance with this Warranty(App. 15-16). Claiming that they had complied with their obligations under the Home Warranty and that they had timely notified B & E and Diane Cox of certain workmanship, material and design defects in violation of that Warranty, the petitioners alleged that B & E refused to honor its obligations under the Home Warranty by not repairing these defects or by repairing these defects improperly so that more damage was done to their home(App. 16).

In addition, the petitioners alleged that B & E had refused to compensate them for their damages and that it had refused to honor its obligation under B & E's Home Warranty to provide them with an inspection one year after the closing(App. 17). As a proximate result of this failure by B & E to honor the Home Warranty, the petitioners are left with a home which contains 174 separate failures by B & E to adhere to acceptable building standards and which has over 130 building code-related defects(App. 17). They will have to pay more than \$200,000 in order to repair the defects which B & E has refused to repair. The petitioners accordingly sought an award of compensatory damages under the Home Warranty against all of the respondents jointly and

severally as partners of the general partnership of B & E(App. 17).

In Count II, they asserted that Basheer/Edgemoore-Southampton, LLC, Diane Cox, Edgemoore Homes, and B & E violated the Virginia Consumer Protection Act (Va. Code Sections 59.1-196 *et seq.*) when it willfully and intentionally misrepresented to the petitioners their rights under the Home Warranty, refused to perform the work called for thereunder, required the petitioners to waive their rights under the Warranty, refused to accept or respond to the petitioners' listing of defects and then refused to conduct a final walk-through inspection without insisting on a waiver of petitioners' rights(App. 18-19). The net result was a Home Warranty which had absolutely no value to the petitioners(App. 19).

Other violations of the Consumer Protection Act were bottomed on the intentionally misleading statements of the respondents Basheer/Edgemoore-Southampton, LLC, Diane Cox, Edgemoore Homes, and B & E, upon which the petitioners relied, that they could not repudiate the agreement after certain lots were made unavailable to them or when certain models could not be built; that their lot would be flat and private when in fact it was sloped and lacked privacy; that utility lines would be buried when in fact they were installed above ground; that their home would be built with skill, workmanship and the highest quality material when in fact it was built poorly, with many defects and lesser quality materials; that it operated without a contractor's license; when it prematurely delivered the home to the petitioners two months before it was finished; and when it failed to install a Radon mitigation system and then affirmatively concealed this fact from the petitioners(App. 19-20).

Consistent with the Consumer Protection Act, the



petitioners under Count II asked for an award of damages from Basheer/Edgemoore-Southampton, LLC, Diane Cox, Edgemoore Homes, and B & E to compensate them for the difference in value between the home B & E promised and the home it actually delivered to them and for the money they spent in attempting repairs in order to put the home in the condition B & E represented it would be in at the time of closing(App. 20-21). In addition, for each willful violation of the Act, they sought an award of the greater of \$1,000 or three times their actual damages incurred together with their attorney's fees and costs(App. 21) from all the respondents.

In Count III, the petitioners relied upon all of the aforesaid material misrepresentations by Basheer/Edgemoore-Southampton, LLC, Diane Cox, and B & E to allege that but for these willful and deliberate misrepresentations, upon which the petitioners relied, Basheer/Edgemoore-Southampton, LLC, Diane Cox, and B & E would not have been able to make the sale(App. 21-24). The petitioners asked for compensatory damages as well as \$350,000 in punitive damages from all the respondents for this fraudulent inducement, conduct which they characterized as malicious, willful and wanton(App. 24).

The petitioners further claimed in Count IV and V, respectively, that all of the respondents committed actual and/or constructive fraud when they failed to install a Radon mitigation system in the petitioners' home as promised and then took affirmative steps to conceal this important fact from the petitioners even though measured Radon levels were four times the maximum allowable safe levels as established by the EPA(App. 24-28). As a result of this actual and/or constructive fraud, the petitioners alleged that they have been forced to live in a home with unsafe levels of Radon, have been denied

the use and enjoyment of a substantial portion of their home, have sustained severe emotional and mental distress, have suffered monetary losses caused by installing a Radon mitigation system themselves and Mrs. Craig has further suffered physical injury in the course of making these repairs as well as a precancerous growth requiring surgery and a noticeable loss of hair(App. 26;28). They sought compensatory damages from all the respondents in the amount of \$500,000 and punitive damages of \$350,000 together with their costs, expenses and attorney's fees(App. 26;28).

Finally, in Count VI, entitled "Vicarious Liability," the petitioners restated their allegations that B & E is a Virginia general partnership which in its advertising, marketing and operation, holds itself out to the petitioners as well as to the general public as an entity which specializes in the construction, sales and financing of residential homes in suburban Virginia and that its partners in this enterprise consist of the respondent Diane Cox; the respondent Edgemoore Homes; the respondent Basheer/Edgemoore-Southampton, LLC; and the respondent Basheer/Edgemoore-Westhampton, LLC(App.28-29).

The petitioners further alleged that this partnership is a *Virginia general partnership by estoppel*, doing business under the trade name of B & E since in their advertising, marketing, construction, sharing of employees, sharing of contractor licenses and their prolific and consistent use of the trade name "B & E," these entities have held themselves out to the petitioners and to the general public as purported partners of the general partnership of B & E operating under the trade name of B & E(App. 29-30).

The petitioners therefore claimed that all of the individually named respondents were partners of the

Virginia general partnership known as B & E; and that all of the actionable conduct described in their complaint was carried out by these partners of the general partnership of B & E in furtherance of its business(App. 30). Accordingly, they asserted that each of these respondents-partners is jointly and severally liable for the debts of the partnership and for the tortious conduct carried out in furtherance of the partnership's business(App. 30). They sought a judgment of joint and several liability against the respondents Diane Cox, Edgemore Homes, Basheer/ Edgemore-Southampton, LLC, and Basheer/Edgemore-Westhampton, LLC in the amount of \$500,000 for compensatory damages, \$350,000 for punitive damages and for the award of their costs, expenses and attorney's fees(App. 31).

The respondents filed a motion to dismiss, a demurrer and a plea in bar to the petitioners' first amended motion for judgment(App. 3). The thrust of the motions was that the "amorphous" entity described as "B & E" by the petitioners is just a trade name for Basheer/Edgemore-Southampton, LLC; that B & E is not a legally recognized entity in Virginia against which a judgment could enter in any event; and that since the petitioners' purchase and sale agreement was only with Basheer/Edgemore-Southampton, LLC, there is no basis in law for claiming that the respondents Diane Cox, Edgemore Homes, and Basheer/Edgemore-Westhampton, LLC had a contractual relationship with them and therefore should not be jointly and severally liable for the tortious conduct of this supposed general partnership of B & E. As they saw it, the respondent Basheer/Edgemore-Southampton, LLC is the *only* entity responsible for the development of the subdivision and the only entity against which the petitioners had a remedy. Furthermore, they asserted that any remedy the

petitioners may have against Basheer/Edgemoore-Southampton, LLC was defined by the terms of the Home Warranty given them incident to the agreement.

The motions came on for hearing in the Circuit Court of Fairfax County, before Williams, J., on December 9, 2004. After hearing the argument of the parties and considering their briefs, the Circuit Court ruled orally from the Bench that the demurrers to Count I would be sustained as to all of the respondents except Basheer/Edgemoore-Southampton, LLC:

...I think that the contract as argued by counsel is definitive. It states who the party is. It does not state it is a partnership, and if there were prior representations that it was a partnership, and paragraph 19 [regarding merger] addresses those prior representations that it was a partnership and they are not made part of the contract.

The contract was signed by the plaintiff. The plaintiff is deemed to know who the contracting party is and—by law, and as a matter of law relies on what the contract says about who the parties are.

*So there is no partnership by estoppel pled here, and I'll sustain the demurrer on that ground.*

As to the substantive breach of warranty allegations, those will, of course, survive against the named partner—the named party.

(Transcript of Hearing, p. 22-24)(emphasis supplied).

The Circuit Court also sustained the demurrers of all the other respondents to Count II's allegations of violations of the Consumer Protection Act because the respondent Basheer/Edgemoore-Southampton, LLC was

the only party to the contract with the petitioners. The motion judge also thought that the petitioners' allegations as to Basheer/Edgemoore-Southampton, LLC on this score were not specific enough to withstand its demurrer and their claim against Basheer/ Edgemoore-Southampton, LLC under Count II was dismissed as well, refusing the petitioners leave to amend their First Amended Motion for Judgment.

Addressing Count III's allegations of fraudulent inducement, the Circuit Court ruled that paragraph 19's merger clause in the agreement bars relief against any of the respondents since the petitioners acknowledged therein that they had not relied upon any other representations outside of this contract. As for the respondents' actual and constructive fraud claims under Counts IV and V based upon all of the respondents' failure to install the Radon mitigation system as promised and then affirmatively concealing this fact from the petitioners, the Circuit Court ruled that there was no causal connection between this alleged failure and the severe emotional and mental distress suffered by Mrs. Craig in spite the physical injury she sustained in the course of making these repairs. Mrs. Craig had severe allergic reactions, a precancerous growth which required surgery, a persistent cough for almost two years, and a noticeable loss of hair. Finally, the lower court determined that the petitioners' Count VI allegations presented merely a theory of liability against all the respondents on the basis of a partnership by estoppel rather than a substantive cause of action; and since it had already ruled that there was no partnership by estoppel on the facts alleged, it dismissed Count VI as well.

A written order reflecting these oral rulings by Judge Williams was entered on December 9, 2004(App. 3). Because the remaining claim under Count I against the



respondent Basheer/ Edgemoore-Southampton, LLC for breach of express warranty was a remedy which would not fix the code violations or compensate the petitioners for the financial, physical and emotional injuries which they had sustained and in order to render the lower court's disposition final for purposes of appellate review, the petitioners moved for the dismissal of Count I(App. 2). The Circuit Court of Fairfax County granted their motion on December 28, 2004(App. 2).

Upon the petitioners' appeal of this final order, the Supreme Court of Virginia summarily affirmed the Circuit Court's decision granting all of the respondents' demurrers in a one-paragraph ruling on June 28, 2005(App. 1).

After obtaining an extension of time from this Court, Thomas, J., the petitioners have now petitioned this Court for the issuance of a writ of certiorari to the Supreme Court of Virginia.

#### **Argument Supporting Allowance of the Writ.**

**The State Courts of Virginia Denied the Petitioners Due Process Of Law When They Unexpectedly and Without Fair Warning Repudiated a State Statute Which Recognizes the Liability of a Partnership Created by Estoppel Thereby Denying The Petitioners a Trial on Their Claims That the Respondents, Acting Collectively as a Purported Partnership Under Virginia Law, Breached Their Contract to Build Them Home, Violated the Virginia Consumer Protection Act and Committed Fraud in Doing So.**

#### ***A. Virginia's Recognition of the Liability of a Partnership Created By Estoppel and the***

***Virginia Courts' Repudiation of That  
Statutory Principle of Liability.***

Since as early as *Hobbs v. Virginia National Bank of Petersburg*, 128 S.E. 46 (Va.1926), the decisional law of Virginia has consistently recognized that a partnership can be created informally by the mere holding out of the partnership to third persons who deal with it as if it were a partnership. *Id.* at 69-70. Thus one who makes or authorizes a statement or representation to a third person that he is a partner, "he is bound thereby to a person to whom the statement or representation was made, and who relied upon it in dealing with the apparent partnership." *Id.* citing *Thompson v. First National Bank*, 111 U.S. 529, 536-537; 541(1884). Moreover, each member of this apparent partnership has the power and authority through his representations to third parties who rely thereon to bind all the other partners of this apparent partnership who consent to the representations to the same extent and in the same manner as though he were a partner in fact. *Id.*

The *Hobbs* Court thus approved of an instruction which told the jury that each member of an apparent or supposed partnership has the authority to bind all the other supposed partners by his acts or contracts in relation to the business of the partnership, including the borrowing of money and the making and delivering of the contracts of the partnership therefor; and as between the partnership and third persons dealing with it in good faith, it is of no consequence whether the partner is acting in good faith with copartner or not, provided the act is done within the scope of the partnership business and professedly for the partnership. *Id.* at 70. *Accord*, *Cullingworth v. Pollard*, 111 S.E. 2d 810, 814-815(Va. 1960); *Cooper v. Knox*, 90 S.E. 2d 844, 847-848(Va. 1956);

*Holloway v. Smith*, 88 S.E. 2d 909, 914(Va. 1955). Compare *B.F. Kennedy v. Dallas Mullins*, 154 S.E. 568, 570 (Va.1930)(lack of agreement *between the supposed partners themselves* destroys any inference of a partnership).

Virginia Code Section 50-73.98, entitled "Liability of a Purported Partner," is the most recent codification of these common law principles of partnership by estoppel. It provides in pertinent part that

(A) If a person, by words or conduct, purports to be a partner, or consents to being represented by another as a partner, in a partnership or with one or more persons not partners, the purported partner is liable to a person to whom the representation is made, if that person, relying on the representation, enters into a transaction with the actual or purported partnership. If the representation, either by the purported partner or by a person with the purported partner's consent, is made in a public manner, the purported partner is liable to a person who relies upon the purported partnership even if the purported partner is not aware of being held out as a partner to the claimant. If partnership liability results, the purported partner is liable with respect to that liability as if the purported partner were a partner. If no partnership liability results, the purported partner is liable with respect to that liability jointly and severally with any other person consenting to the representation....

With these statutory principles of partnership by estoppel in mind, the petitioners unambiguously alleged that this apparent partnership among Diane Cox;



Edgemoore Homes; Basheer/Edgemoore-Southampton, LLC; and Basheer/Edgemoore-Westhampton, LLC, is a **Virginia general partnership by estoppel**, doing business under the trade name of B & E because in their advertising, brochures, letters, letterheads, marketing, construction, sharing of employees, sharing of contractor licenses and their prolific and consistent use of the trade name "B & E" with the petitioners as their customers, these entities all held themselves out as purported partners of a general partnership called "Basheer & Edgemoore" or B & E, regardless of what particular partner signed the agreement for the purchase and sale of their home(App. 29-30). In essence, the petitioners were bringing suit against **the partnerships** with whom they had dealt and upon whom they relied in purchasing their new home. See *Bryant Elec. Co., Inc. v. Joe Rainero Tile Co.*, 84 F.R.D.120, 123 (W.D. Va. 1979).

Since all of these partners committed the actionable conduct in furtherance of partnership business within the meaning of Virginia Code Section 50-73.98, the petitioners alleged that each of them by statute is jointly and severally liable for the debts of the partnership and for the tortious conduct carried out in furtherance of its business(App. 30).

Despite established law in Virginia that upon demurrer such allegations are taken as true and read with every deference to the petitioners, *Ward's Equip. v. New Holland North Am.*, 493 S.E. 2d 516, 518(Va. 1997), the Circuit Court inexplicably and unexpectedly repudiated Virginia Code Section 50-73.98's language recognizing the liability of a partnership created by estoppel and determined that since the petitioners had contracted with one of the partners, the respondent Basheer/Edgemoore-Southampton, LLC, for the purchase of their home, "there is no partnership by estoppel pled here," sustaining

the demurrer on Count I as to all the other respondents.

This ruling carried over to the other five substantive counts of the petitioners' complaint (Counts II-VI) so that none of the respondents, while furthering the partnership business, could be held liable for violations of the Virginia Consumer Protection Act, for fraud in the inducement or for the actual or constructive fraud they committed when they failed to install the Radon mitigation system as promised and then affirmatively concealed this fact from the petitioners or vicarious liability. The Virginia Supreme Court ratified this inexplicable and unexpected ruling with its one-paragraph affirmance.

***B. The Virginia Courts Have Denied the Petitioners Due Process of Law.***

With "very rare exceptions," *Adams v. Robertson*, 520 U.S. 83, 86(1997) quoting *Yee v. Escondido*, 503 U.S. 519, 533(1992), this Court has adhered to the rule in reviewing state court judgments under 28 U.S.C. Section 1257(a), that it will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision it has been asked to review. *Id.* As in *Adams*, the State's highest appellate court has not expressly addressed the constitutional question raised by the petitioners here to justify the grant of a writ of certiorari.

However, the federal guaranty of due process, as applicable to the petitioners under the fourteenth amendment, extends to state action through its judicial as well as through its legislative, executive or administrative branch of government. *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 680 (1930). With any matter before it, this Court's

present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether [they have] had an opportunity to present [their] case and be heard in its support...[W]hile it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in doing so, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

*Id.* at 681-682 (Brandeis, J.) (footnotes omitted).

Thus in *Bowie v. City of Columbia*, 378 U.S. 347, 352-355 (1964), this Court on its own inquiry determined that regardless of the petitioners' failure to raise properly the federal issue in State court, South Carolina's highest court in its decision had retroactively broadened its interpretation and application of a state trespass law so far beyond what a "fair reading" of the state law would permit as to constitute a denial of due process. *Id.* It held that "[w]hen a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law 'in its primary sense of an opportunity to be heard and to defend [his] substantive right.'" *Id.* at 354 quoting *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. at 678.

Other decisions by this Court confirm the principle that where State trial and appellate courts have interpreted their own State statute in a way that was unforeseen, "unexpected," or "indefensible by reference to

the law which had been expressed prior to the conduct in issue," in order to deny the state-court litigant an opportunity to be heard on the substantive right affected, it violates that litigant's due process rights regardless of whether he has timely or properly raised the federal issue in State court. See, e.g., *Bush v. Gore*, 531 U.S. 98, 115(2000)(Rehnquist, C.J., concurring)(State court's interpretation of its own election laws impermissibly distorted them beyond what a fair reading required); *Wright v. Georgia*, 373 U.S. 284, 289-291(1963)(breach of peace statute newly construed; violation of due process); *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 457-458(1958)(state court's unexpected resort to new procedural rules at odds with prior practice to deny relief to alleged contemnors is a violation of due process). See also *United States v. Lanier*, 520 U.S. 259, 266 (1997) (due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope); *Marks v. United States*, 430 U.S. 188, 191-192(1977)(due process protects against judicial infringement of the "right to fair warning" that certain conduct will give rise to criminal penalties).

Such is the case here. In sustaining the demurrers of the respondents below, both the Circuit Court and the Supreme Court have adopted an unforeseen and unexpected reading of Virginia Code Section 50-73.98---in fact, *they have repealed its provisions entirely*---- so that the petitioners' good faith allegations of a partnership by estoppel are completely disregarded and the respondents' collective conduct operating under the marketing banner of the partnership B & E is made immune from liability. This unfair and stilted reading of the petitioners' complaint, framed precisely within the language of Virginia Code Section 50-73.98, is

"indefensible by reference to the law which had been expressed prior to the conduct in issue," *Bowie*, 378 U.S. at 354; and it is so far beyond what a "fair reading" of Section 50-73.98 would permit as to constitute a denial of due process. *Id.* at 354-355.

While a state may set the terms on which it will permit litigation in its courts, *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 552(1949), it may not close its court house doors to litigants by denying them at the pleading stage the opportunity to be heard on claims which its legislature has already made clear are available to them upon proper proof. The Virginia courts' repudiation of the statutory principle of partnership liability created by estoppel denies the petitioners due process and a fair hearing on their allegations.

### ***C. The Process Due The Petitioners In the Circumstances.***

The petitioners' cause of action is a valuable property right entitled to due process protection. *Los Angeles v. David*, 538 U.S. 715, 717(2003) (deprivation of money is the deprivation of property for purpose of evaluating due process protection). *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538;541 (1985).

This Court's decision in *Mathews v. Eldridge*, 424 U.S. 319, 334-335(1976) dictates that the process due in any given instance is determined by weighing "the private interest that will be affected by the official action" against the government's asserted interest, "including the function involved" and the burdens the government would face in providing greater safeguards. *Id.* at 335. The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of "the risk of an erroneous deprivation" of the private interest if



the process were reduced and the "probable value, if any, of additional or substitute procedural safeguards." *Id.* See *Hamdi v. Rumsfeld*, 542 U.S. 507, 528-529(2004). See also *Wilkinson v. Austin*, \_\_\_ U.S. \_\_\_, \_\_\_(6/13/05).

Employing the *Mathews* calculus to the circumstances of this case, the petitioners submit that the process due them below consists of the opportunity to conduct further discovery on their allegations of partnership by estoppel, a full trial on the merits of their claims against all of the respondents on this theory of liability based upon partnership by estoppel where their proof will be tested before an impartial tribunal/fact finder. See *Hamdi v. Rumsfeld*, 542 U.S. at 533 quoting *Ward v. Monroeville*, 409 U.S. 57, 61-62(1972); *Goldberg v. Kelly*, 397 U.S. 254, 269-270(1970).

### **Conclusion.**

For all of these reasons identified herein, a writ of certiorari should issue to the Supreme Court of Virginia, to review its decision and vacate the judgment entered in that court and remand the matter to the Circuit Court of Fairfax County for continued discovery and an eventual trial consistent with due process on the petitioners' claims that the respondents' alleged conduct constitutes a partnership by estoppel and that each of them should be jointly and severally liable to the petitioners as partners of this general partnership known by and marketed to the petitioners and the public as B & E; or to provide the petitioners with such other relief as is fair and just in the circumstances.

Respectfully submitted,

Stephen V. Craig, *Pro se*

29

Un Sun H. Craig, *Pro se*  
7545 Laurel  
Creek Lane  
Springfield,  
VA 22150-4908  
(703)866-4543

1a

Virginia:

Record No. 050605  
Circuit Court No. L220180

In the Supreme Court of Virginia held at the Supreme  
Court Building in the City of Richmond on Tuesday the  
28<sup>th</sup> day of June, 2005.

Stephen V. Craig, et al.,  
Appellants

Against

Basheer & Edgemore, et al.,  
Appellees

Form the Circuit Court of Fairfax

Received 6/29/2005

Upon review of the record in this case and  
consideration of the argument submitted in support of  
and in opposition to the granting of an appeal, the  
Court is of opinion there is no reversible error in the  
judgment complained of. Accordingly, the Court  
refuses the petition for appeal.



2a

Virginia

Law No. 220180

IN THE CIRCUIT COURT OF THE FAIRFAX  
COUNTY

STEPHEN V. CRAIG, ET AL.,  
PLAINTIFFS,

V.

DIANE COX BASHEER COMMUNITIES, INC. ET  
AL.,  
DEFENDANTS.

ORDER

THIS CAUSE came before the Court on the Plaintiff's Motion to Dismiss Count One (Breach of Express Warranty) against Defendant Basheer Edgemoore Southampton, L.L.C.

NOW, THEREFORE, it is hereby ADJUDGED, ORDERED and DECREED that the Motion to dismiss is granted and Count One is dismissed with prejudice against Defendant Basheer Edgemoore Southampton, L.L.C.

There being no further Counts or Defendants now before the Court, this order is FINAL.

Entered this 28<sup>th</sup> day of December, 2004

s/ Judge, Circuit Court of Fairfax County

3a

Case No. Law 220180

VIRGINIA:  
IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Stephen V. Craig et al., Plaintiff/Complainant

VS.

Diane Cox Basheer Communities, Inc. et al., Defendant

ORDER

This cause came to be heard on the 9th day of December, 2004, on the Plaintiffs/Defendant's motion to dismiss, demurrer and plea in bar.

Upon the matters presented to the Court at the hearing, it is ORDERED as follows: for the reasons stated from the bench, the motion to dismiss is denied. The demurrer on Count I is sustained as to all defendants except Basheer/Edgemoore-Southampton, LLC, and the demurrers to Count II, III, IV, V and VI are sustained. All demurrers are sustained with prejudice, and the request for leave to amend is denied. The case will proceed forward on Count I breach of warranty, against Basheer/Edgemoore-Southampton, LLC. The plea in bar is rendered moot. The Answer and Grounds of Defense shall be filed within 14 days.

Entered this 9th day of December, 2004.

[Marcus D. Williams]  
Circuit Court Judge

VIRGINIA:

IN THE CIRCUIT COURT OF THE FAIRFAX  
COUNTY

Law No.220180

STEPHEN V. CRAIG and UN SUN H. CRAIG,  
Plaintiffs,

v.

DIANE COX BASHEER COMMUNITIES, INC.,  
t/a DIANE COX BASHEER COMMUNITIES,

serve:

William L. Matson, Registered Agent MATSON,  
FREYVOGEL, P.C. 1650 Tysons Boulevard, Suite 700  
McLean, VA 22102

and

EDGEMOORE HOMES, L.L.C., t/a EDGEMOORE  
HOMES,

serve: John W. Foust, Registered Agent FOUST &  
CLARK, PC 8345-A Greensboro Drive McLean, VA  
22102

and

BASHEER, EDGEMOORE - SOUTHAMPTON,  
L.L.C., t/a BASHEER & EDGEMOORE,

serve: William T. Freyvogel, Esq., Reg. Agent  
MATSON, FREYVOGEL, P.C.

1650 Tysons Boulevard, Suite 700 McLean, VA 22102

BASHEER, EDGEMOORE - WESTHAMPTON,  
L.L.C.,  
t/a BASHEER & EDGEMOORE,  
serve:

William L. Matson, Registered Agent  
MATSON, FREYVOGEL, P.C.  
1650 Tysons Boulevard, Suite 700  
McLean, VA 22102

BASHEER & EDGEMOORE, a Virginia general  
partnership

serve: William L. Matson, Registered Agent for  
partner

DIANE COX BASHEER COMMUNITIES, INC.  
MATSON, FREYVOGEL, P.C.

1650 Tysons Boulevard, Suite 700 McLean, VA 22102  
Defendants, as their interests may appear.

### FIRST AMENDED MOTION FOR JUDGMENT

COME NOW the Plaintiffs, Stephen V. Craig and Un  
Sun H. Craig, by counsel, and file  
this Motion for Judgment, and in support thereof  
respectfully represent unto the Court as follows:

1. Basheer & Edgemore is a Virginia general  
partnership.
2. The partners of the Basheer & Edgemore  
partnership are Diane Cox Basheer Communities, Inc.,  
Edgemore Homes, L.L.C., Basheer/Edgemore -  
Southampton, L.L.C., Basheer/Edgemore -

Westhampton, L.L.C., and possibly other entities or persons.

3. Edgemoore Homes is the fictitious trade name for Edgemoore Homes, L.L.C., a Virginia Limited Liability Company.

4. Diane Cox Basheer Communities is the fictitious trade name for Diane Cox Basheer Communities, Inc., a Virginia Corporation.

5. Basheer/Edgemoore - Southampton, L.L.C., is a Virginia Limited Liability Company and operates under the trade name Basheer & Edgemoore.

6. Basheer/Edgemoore - Westhampton, L.L.C., is a Virginia Limited Liability Company and operates under the trade name Basheer & Edgemoore.

7. In advertising, marketing, construction, sharing of employees, sharing of contractor licenses, and prolific use of the trade name Basheer & Edgemoore, Diane Cox Basheer Communities, Inc., Edgemoore Homes, L.L.C., Basheer/Edgemoore- Southampton, L.L.C., Basheer/Edgemoore - Westhampton, L.L.C., and possibly other entities or persons have held themselves out to the public as a Virginia general partnership and have operated as a partnership by estoppel.

8. In reliance upon the existence of the general partnership as described in Paragraph 7, Stephen V. Craig and Un Sun H. Craig entered into a contract with the general partnership. Specifically, on or about May 20, 2000, Stephen V. Craig and Un Sun H. Craig entered into an Agreement of Purchase and Sale (the "Agreement") of 7545 Laurel Creek Lane, Springfield, VA 22150 (also referred to as "Lot 36" and the "Property") in Fairfax County, Virginia with Basheer/Edgemoore - Southampton, L.L.C., trading as Basheer & Edgemoore, a member of the general partnership. A

copy of the Agreement is attached hereto as Plaintiffs Exhibit 1.

9. As of May 20, 2000 when the Agreement was executed, Basheer/Edgemoore Southampton, L.L.C. was not a licensed contractor. Basheer/Edgemoore - Southampton, L.L.C. was initially certified (License Number 2705 06874) on February 9, 2001, well into the construction of the Property.

10. Prior to the licensing of Basheer/Edgemoore - Southampton, L.L.C., Basheer & Edgemoore relied upon the contractor's license for Basheer/Edgemoore - Westhampton, L.L.C. to obtain building permits and commence work on the Property under the Agreement.

11. In advertising material for the Property which was provided to the Plaintiffs and to the general public, Basheer & Edgemoore held itself out to be a partnership of Defendants Diane Cox Basheer Communities, Inc. and Edgemoore Homes, L.L.C. See Exhibit 2.

12. In a letter to the Plaintiffs dated May 24, 2000, which transmitted a copy of the Contract to purchase the Property; a letter to the Plaintiffs dated April 13, 2001, which set the closing date for the purchase of the Property; and a letter to the Plaintiffs dated May 3, 2001 which transmitted a copy of the Warranty for the Property, Defendants Diane Cox Basheer Communities, Inc. and Edgemoore Homes, L.L.C. held themselves out to be a partnership trading under the name Basheer & Edgemoore. See Exhibit 3.

13. Defendants Diane -Cox Basheer Communities, Inc., Edgemoore Homes, L.L.C., Westhampton, L.L.C., and Southampton, L.L.C., share employees and officers with one another while operating under the name Basheer & Edgemoore.



14. After a series of addenda to the Agreement referred to in paragraph 8 above, Basheer/Edgemoore - Southampton, L.L.C., a member of the general partnership, sold the Property to the Plaintiffs for a total price of \$610,833.00 and a deed was recorded on May 8, 2001.

15. Basheer & Edgemoore expressly warranted the property with a One Year Limited Warranty (the "Warranty"). See Exhibit 4.

16. Prior to entering into the Agreement, the Plaintiffs had numerous conversations with Ms. Mange Heinly, a Sales Manager for Basheer & Edgemoore.

17. In May, 2000, before contracting to purchase the property, Plaintiff Un Sun Craig emphasized to Ms. Heinly the things that were most important to her in making her decision to purchase.

18. The first item was the price of the Property. The Plaintiffs told Ms. Heinly that they were considering purchasing a used (less than one year old) Basheer & Edgemoore Ashmont model in Westhampton for \$495,000 (the "Alternative"). The Plaintiffs wanted to know the price of the Property to compare to the Alternative. Ms. Heinly told Un Sun Craig the cost of the Property but did not tell her that there would be additional costs associated with upgrades. Ms. Heinly told Un Sun Craig to see a model house in Farcroft in Old Town Fairfax ("Model"). In large part, the Plaintiffs based their decision to forego the purchase of the Alternative and purchase the Property on the quality of the product they saw in the Model and the price quoted to them by Mrs. Heinly.

19. The second item related to the characteristics of the lot for the Property. Un Sun Craig told Ms. Heinly that the front, back, and side yards of the home she was to purchase must be big and flat. In May, 2000 Ms. Heinly

and Un Sun Craig looked at the Alternative together. Ms. Heinly said that the Alternative did not have any privacy and that lot 36 was bigger than the Alternative and flat like the Alternative.

20. Ms. Heinly told the Plaintiffs that they should purchase Lot 36. She assured the Plaintiffs that there would be no slope when construction was completed. When Plaintiffs expressed their concerns about having a big slope during early construction, Ms. Heinly assured the Plaintiffs that once construction was complete there would not be a significant slope. Ms. Heinly also assured Plaintiffs that there would be additional trees planted. The Plaintiffs paid a premium for both the flat lot and the trees. In fact, when construction was completed, the Property had very significant slopes, and the type of trees that were promised were not planted.

21. The Plaintiffs informed Ms. Heinly that they wished to purchase an Ashmont model home with a Southern Style. Ms. Heinly would not accommodate such request, saying in May of 2000 that it was prohibited to put two of the same models next to each other, and that there would be an Ashmont model on the lot next to the lot the Plaintiffs were going to purchase. Despite this, Basheer & Edgemoore later built a home of the same model next to the Plaintiffs' home. There are also three houses of the same model next to each other built by Basheer & Edgemoore elsewhere in the neighborhood. Ms. Heinly misrepresented that such prohibition existed.

22. The Plaintiffs informed Ms. Heinly that they wished to purchase a house with a side sunroom and side garage. Ms. Heinly informed Plaintiffs that Lot 10 would accommodate such a request but that there was a big competition to purchase Lot 10 because many

people were waiting for that Lot. Therefore, the Plaintiffs asked Ms. Heinly if they could build on Lot 8 or Lot 9 without a side garage. Ms. Heinly told them that a side sunroom could not be built on Lot 8 or Lot 9. The homes on Lots 8 and 9 were later built with side sunrooms. Ms. Heinly continued to steer the Plaintiffs to Lot 36 by making misrepresentations to them.

23. Prior to Closing, the Plaintiffs requested to be released from the Agreement and told Ms. Heinly those items which they felt had been misrepresented. The Plaintiffs told Ms. Heinly in July of 2000 that they would rather lose some money deposited pursuant to the Agreement than go forward with a home purchase with which they would not be happy. Ms. Heinly told them that "no one backs out" and refused to discuss terminating the Agreement and forfeiture of the deposit. The Plaintiffs subsequently learned that one or two other purchasers were given the option to build their houses in other lots under similar circumstances.

24. Basheer & Edgemoore, through Ms. Heinly and other representatives of the Defendants, promised the Plaintiffs that their home would be built with the same characteristics and with materials of the same standard, quality, grade, style and model as the Model and as shown in the samples provided by Basheer & Edgemoore, which samples the Plaintiffs saw and upon which they based their decision to purchase the Property. The elements of the Property sold to the Plaintiffs are of grossly inferior quality to those of the Model and that shown in the samples, despite the Plaintiffs' paying \$130,933.00 in premiums and upgrades, some of which had been represented as standard and for which they did not expect to pay extra.

25. Ms. Heinly did not tell the Plaintiffs that a "Bonus" room could not be built on Lot 36 until they had secured Lot 36 and foregone the purchase of the Alternative. There was a "Bonus" room in the Model.

26. Ms. Heinly told the Plaintiffs that no pine trees would be planted adjacent to their Property, but pine trees were planted adjacent to the Property.

27. In June of 2000, Don Smith, a representative of Basheer & Edgemoore, told the Plaintiffs that the common area behind Lot 36 would be landscaped by planting nice shrubs and bushes, instead of grass, but this landscaping was never done.

28. In reliance on the representations of Ms. Heinly and other employees of the Defendants, the Plaintiffs decided to, and did, build a new home and paid \$115,833.00 more than they would have if they had purchased the Alternative that they originally wanted.

29. At the time the Agreement was executed, Basheer/Edgemoore - Southampton L.L.C. was not a licensed contractor despite the fact that they held themselves out to the public to be legally cagaged in such business.

30. Basheer & Edgemoore - Southampton L.L.C. relied upon the contractor's license of its partner Basheer & Edgemoore - Westhampton L.L.C. to obtain permits and begin construction on the Property.

31. Basheer & Edgemoore refused to let the Plaintiffs visit the Property prior to Closing, and told them they would be trespassing if they went on the Property. Other neighboring purchasers of Basheer & Edgemoore Homes were allowed pre-drywall walk-throughs, opportunities that were refused to the Plaintiffs.

32. The Property was warranted for a period of one year by Basheer & Edgemoore from the date of Closing

against defects in workmanship, material, and design. (The "Warranty") See Exhibit D.

33. Under the Warranty, the Plaintiffs were promised a pre-Closing inspection, a re-inspection 90 days after Closing, and an end of year walk-through inspection.

34. In March or April of 2001, Dave Doss, building operations manager for Basheer &

Edgemoore, told the Plaintiffs that he would make the right side of the yard at least walkable and that the right side of the backyard would be the flattest part.

35. In May and June of 2001, Don Smith, a representative of Basheer & Edgemoore, told the Plaintiffs that a crew would work on the slope issues in the back yard and would not lay down sod until the Plaintiffs agreed. In fact, the work subsequently done made the slope worse and the sod was put down over the slope, without agreement from the Plaintiffs.

36. Since closing on May 8, 2001, the Plaintiffs have encountered numerous problems with the Property.

37. John Wells, Superintendent of Construction for Basheer & Edgemoore, told the Plaintiffs in June of 2001 that the house was sold two months before it was ready for closing. Basheer & Edgemoore rushed completion of the construction of the Property in an attempt to have the Property completed within one year from the date of the signing of the Agreement.

38. As a result of this rushed construction, there were numerous leaks from the main pipelines, roof, and various other areas when the Plaintiffs moved in to the property. Many upgraded items were either scratched and/or chipped, installed in the wrong place, with either the wrong materials, or materials of quality inferior to which Basheer & Edgemoore represented would be installed.



39. Attached hereto and incorporated by reference herein as Plaintiffs' Exhibit 5 is a copy of the 90 day Walk-Through discrepancy list the Plaintiffs gave to Basheer & Edgemoore at the 90 day walk-through.

40. The Property was not free from workmanship, material and design defects.

41. Basheer & Edgemoore ordered and installed the wrong materials, denied the Plaintiffs certain upgrades, did not show the Plaintiffs samples that were shown to others, charged the Plaintiffs for additional upgrades that others did not pay, did not provide the Plaintiffs with items that others received, and created new damage during the course of some attempted repairs and then refused to fix the new damage.

42. The Plaintiffs on numerous occasions, orally and in writing, informed Basheer & Edgemoore of workmanship, material and design defects with the home, as well as new damage created by repair crews while working on the home. Basheer & Edgemoore has made numerous promises that they would correct and repair such defects, but to date the defects have not been corrected or repaired so that they would pass without objection in the trade.

43. On November 30, 2001, Un Sun Craig sent the attached memorandum to Basheer & Edgemoore detailing items that needed to be corrected and repaired. See Exhibit 6. On December 18, 2001, Richard J. Cone of Basheer & Edgemoore responded to the Plaintiffs' letter of November 30, 2001 stating "80-85% of the items on the list have been completed" when in fact they had not been completed. See Exhibit 7.

44. On March 13, 2002, the Plaintiffs sent the attached Memorandum to Basheer & Edgemoore requesting items to be completed under the Warranty. See Exhibit 8.



45. Pursuant to the terms of the Warranty, the Plaintiffs were entitled to a one-year walk through inspection. At the time set the one-year walk through inspection, John Saul, Warranty Service Manager of Basheer & Edgemore, refused to conduct the inspection unless the Plaintiffs signed a waiver of all rights prior to the inspection. When Plaintiffs did not sign this waiver, John Saul refused to conduct the inspection. See Exhibit 9. It is not the policy of Basheer & Edgemore to require such a waiver and it is not part of the Warranty.

46. The attempt to make the Plaintiffs sign a waiver of their rights under the warranty prior to beginning the final one-year walk through was never required of other home purchasers similarly situated. Basheer & Edgemore refused to conduct the one-year walk through required by the warranty.. Attached hereto and incorporated by reference herein as Plaintiffs' Exhibit 10 is a copy of a punch list prepared by Investment. Protection Corp., a certified home inspector, which report was provided to Basheer & Edgemore, but which Basheer & Edgemore refused to consider.

47. Additionally, the Plaintiffs have recently learned that the distance between the centers of the floor joists as installed by Basheer & Edgemore was greater than that permitted by the architectural drawings submitted to Fairfax Count by the Defendants.

48. This failure to properly construct the Property pursuant to the architectural plans has caused, and continues to cause damage to the Property, including continuous cracking and separating of drywall and tiling throughout the Property.

49. Additionally, the Plaintiffs have recently learned that Basheer & Edgemore failed to install the Radon

mitigation system contracted for by the Plaintiffs in the Agreement.

50. Basheer & Edgemoore employees and supervisors took affirmative steps to conceal from the Plaintiffs the fact that Basheer & Edgemoore had failed to install the Radon mitigation system contracted for by the Plaintiffs.

51. Specifically, on September 26, 2001, John Saul, Warranty Service Manager for Basheer & Edgemoore, noted in his report of his 90 day inspection of the Plaintiffs' Property that the Radon mitigation system had not been installed but that this fact "was not conveyed to owner."

52. Specifically, on October 5, 2001, Robert Broy, Warranty Service Employee for Basheer & Edgemoore, wrote in a memorandum to the file that the Radon mitigation system had not been installed. Neither Mr. Broy nor Basheer & Edgemoore ever informed the Plaintiffs of this failure to install the Radon mitigation system.

53. Radon-levels subsequently measured for the Property grossly exceed the maximum allowable safe levels as established by the federal Environmental Protection Agency. COUNT ONE

#### BREACH OF EXPRESS WARRANTY (All Defendants)

54. Plaintiffs reallege and incorporate by reference herein the allegations contained in numbered paragraphs one (1) through fifty-three (53) above. In reliance upon the existence of the general partnership as described in Paragraph 7, Stephen V. Craig and Un Sun H. Craig entered into a contract with the general partnership. Specifically, on or about May 20, 2000,

Stephen V. Craig and Un Sun H. Craig entered into an Agreement of Purchase and Sale (the "Agreement") of 7545 Laurel Creek Lane, Springfield, VA 22150 (also referred to as "Lot 36" and the "Property") in Fairfax County, Virginia with Basheerl Edgemoore - Southampton, L.L.C., trading as Basheer & Edgemoore, a member of the general partnership. Pursuant to the provisions of the contract, Basheer & Edgemoore provided the Plaintiffs with an express written warranty that the Property would be free from workmanship and material defects. (Exhibit 2).

55. The written warranty provides, "For a period of one year, from the date of your closing, Basheer & Edgemoore warrants your home against workmanship and material defects. Your Superintendent, John Wells, will complete any remaining items on your pre-closing inspection list. Approximately 90 days after closing, you will be contacted by our Customer Service Manager, John Saul, to schedule a re-inspection of your home to ascertain all is going well for you as a new homeowner,... Then again, just prior to the end of your first year of homeownership, John will be in touch with you to arrange an end of year walk-through." (Exhibit B).

56. The Plaintiffs have complied with their obligations under the Warranty and have made known to Basheer & Edgemoore certain workmanship, material and design defects which are more fully set forth in Exhibits 6, 8 and 10.

57. Basheer & Edgemoore has promised to make repairs and alterations to the Property. Such repairs and alterations have either not been done, or have not been done properly, or if done, have created additional damage that has not been repaired.

58. Basheer & Edgemoore has refused to compensate the Plaintiffs for these damages.

59. Basheer & Edgemoore refused to honor their obligation to provide the Plaintiffs with a one-year walk-through, denying the Plaintiffs the benefit of the warranty.

60. As a direct and proximate result of Basheer & Edgemoore's breach of express warranty, the Property is not free from workmanship, material and design defects, it is not free from structural defects, it is not constructed in a workmanlike manner, it is not fit for habitation, the Property is not worth the value it would have if free from defects as warranted, and the Plaintiffs have had to pay money out of pocket to correct and repair those items that the Basheer & Edgemoore has wrongfully refused to correct and repair.

61. In order to put the Property in the condition as contracted for and warranted by Basheer & Edgemoore, the Plaintiffs will be required to expend in excess of \$200,000.

62. As partners in the general partnership Basheer & Edgemoore, Diane Cox Basheer Communities, Inc., Edgemoore Homes, L.L.C., Basheer/Edgemoore - Southampton, L.L.C., Basheer/Edgemoore - Westhampton, L.L.C., are jointly and severally liable for the debts of the partnership.

WHEREFORE, on Count I the Plaintiffs seek an award of damages against Basheer & Edgemoore, Diane Cox Basheer Communities, Inc., Edgemoore Homes, L.L.C., Basheer/Edgemoore - Southampton, L.L.C., and Basheer/Edgemoore-Westhampton, L.L.C., for breach of the Warranty.

**COUNT TWO**  
**BREACH OF THE VIRGINIA CONSUMER**  
**PROTECTION ACT**

(Defendants Basheer/Edgemoore-Southampton L.L.C.-  
and Basheer/Edgemoore General Partnership)

63. Plaintiffs reallege and incorporate by reference herein the allegations contained in numbered paragraphs one (1) through fifty-three (53) above.

64. The sale of the Property is a consumer transaction in Virginia and is regulated and subject to the Virginia Consumer Protection Act. (Virginia Code §59.1-196 et seq. ). The Act prohibits suppliers from misrepresenting that goods or services have certain quantities, characteristics, uses or benefits. The Act also prohibits suppliers from misrepresenting that goods or services are of a particular standard, quality, grade, style or model.

65. In violation of the Act, Basheer & Edgemoore willfully and intentionally misrepresented the characteristics, standards, quality, grade, style and model of the Property that they sold to the Plaintiffs.

66. Basheer & Edgemoore also willfully and intentionally misrepresented the rights that the Plaintiffs would have under the Warranty. The Warranty provided by Basheer & Edgemoore is deceptive in that it promises freedom from workmanship and material defects, yet Basheer & Edgemoore limited the ability of the Plaintiffs to assert their rights under the warranty by refusing to do the work, by requiring the Plaintiffs to waive their rights under the Warranty, refusing to accept a written explanation from the Plaintiff of defects, and refusing to give the Plaintiffs a walk-through as promised. The net



result is that the Warranty is worthless, misleading the Plaintiffs to believe it was of some value to them.

67. Basheer & Edgemoore also willfully and intentionally misrepresented the rights the Plaintiffs had to repudiate the Agreement, the lots that were available on which to build, and the model that could be built on the lot.

68. Basheer & Edgemoore willfully and intentionally misrepresented that all other lots would have a higher premium than the lot purchased by the Plaintiffs, and misrepresented that their lot would be flat with privacy when in fact it is severely sloped with little privacy.

69. Basheer & Edgemoore willfully and intentionally misrepresented that all utility lines in the Southampton entrance would be buried underground when in fact there are aboveground utility poles.

70. Basheer & Edgemoore willfully and intentionally misrepresented that the home sold to the Plaintiffs would be finished without material and design defects, willfully misrepresented the quality of materials to be incorporated in the home, and willfully misrepresented that the home would be delivered free from leaks in the roof, pipelines, and other places.

71. Further, Basheer & Edgermoore willfully and intentionally held themselves out to be licensed to transact business in Virginia when in fact they did not have a contractor's license. 72. Moreover, Basheer & Edgemoore willfully and intentionally sold the home two months before it was finished, even though the Plaintiffs requested a delay so that the home could be completed properly.

73. The Defendants, pursuant to the terms of the Agreement, were required to install a Radon mitigation system. The Defendants willfully and intentionally did not install the Radon mitigation system and willfully



and intentionally concealed the failure to install this system from the Plaintiffs. Specifically, on September 26, 2001, John Saul, Warranty Service Manager for Basheer & Edgemoore, noted in his 90 day inspection report of the Plaintiffs' Property that the Radon mitigation system had not been installed and that this information "was not conveyed to owner." John Saul did not advise the plaintiffs of the absence of the Radon mitigation system because in his view he worked for the builder and was not a home inspector. Specifically, on October 5, 2001, Robert Broy, Warranty Service Employee for Basheer & Edgemoore, wrote a memorandum to the file that the Radon mitigation system had not been installed. Neither Mr. Broy nor Basheer & Edgemoore ever informed the Plaintiffs of this failure to install the Radon mitigation system. The concealment of these facts from the Plaintiffs was done willfully, knowingly and intentionally, and was intended to conceal from the Plaintiffs the failure of the Defendants to perform their obligations under the Agreement.

74. These misrepresentations were made willfully and intentionally to make a sale that Basheer & Edgemoore would not have been able to make to these Plaintiffs without the misrepresentations.

75. The Plaintiffs purchased the Property in reliance on Basheer & Edgemoore's willful and intentional misrepresentations and have suffered monetary damage and great inconvenience. WHEREFORE, on Count II the Plaintiffs seek an award of damages against Defendants Basheer/Edgemoore-Southampton L.L.C. and Basheer/Edgemoore General Partnership, in an amount the greater of \$500.00 or the difference in either the value of the Property as represented by Basheer & Edgemoore or the value of other property

the Plaintiffs sought to purchase and the Property as delivered by Basheer & Edgemore as well as money spent by the Plaintiffs in an attempt to make repairs or alterations to the Property to bring it to the value of the Property they would have purchased or the Property as represented, and for each willful violation, the greater of \$1,000.00 or three times their actual damages incurred as outlined above together with an award of reasonable attorneys fees and costs incurred as provided in Virginia Code §59.1-204.

### COUNT THREE FRAUDULENT INDUCEMENT

(Defendants Basheer/Edgemore-Southampton L.L.C. and Basheer/Edgemore General Partnership)

76. Plaintiffs reallege and incorporate by reference herein the allegations contained in numbered paragraphs one (1) through fifty-three (53) above.

77. Representatives of Basheer & Edgemore made misrepresentations of material facts to the Plaintiffs that they either knew, or should have known, were false.

78. Misrepresentations were made knowingly to induce to Plaintiffs to enter into a Contract with Basheer & Edgemore.

79. Misrepresentations were made regarding present facts known to Basheer & Edgemore such as at the time they promised the Plaintiffs that their yard would be flat, they knew that the yard would not be flat and they had no intention of making it flat despite their assurances to the contrary.

80. Ms. Marge Heinly knew or should have known when she stated that the Property would be as flat as the

Alternative that her representation to the Plaintiffs was false.

81. Ms. Heinly knew when she stated that the Plaintiffs' home would be of the same quality finish and structural integrity as the Model that Basheer & Edgemoore would not build a home of the same quality finish and structural integrity as the model.

82. These misrepresentations were made knowing that promises would not be fulfilled.

83. Basheer & Edgemoore made misrepresentations knowingly and intentionally to mislead the Plaintiffs and as such perpetrated actual fraud on the Plaintiffs.

84. Basheer & Edgemoore misrepresented the characteristics, standards, quality, grade, style and model of the Property that they sold to the Plaintiffs.

85. Basheer & Edgemoore misrepresented the rights that the Plaintiffs would have under the Warranty.

86. Basheer & Edgemoore representatives knowingly and intentionally misrepresented the rights the Plaintiffs had to repudiate the Agreement, the lots that were available on which to build, and the model that could be built on the lot Basheer & Edgemoore forced the Plaintiffs to buy, causing the Plaintiffs to pay for a more expensive model.

87. Basheer & Edgemoore representatives misrepresented the lot they were selling to the Plaintiffs to be flat and have privacy.

88. Basheer & Edgemoore misrepresented that utilities would be underground and there would be no aboveground wires and poles.

89. Basheer & Edgemoore misrepresented that all other lots had a higher premium than the lot purchased by the Plaintiffs, and misrepresented that the lot sold to the Plaintiffs was flat with privacy when in fact it was severely sloped with little privacy.

90. Basheer & Edgemore held themselves out to be licensed to transact business in Virginia when in fact they did not have a contractor's license.

91. The Defendants, pursuant to the terms of the Agreement, were required to install a Radon mitigation system. The Defendants willfully and intentionally did not install the Radon mitigation system and willfully and intentionally concealed the failure to install this system from the Plaintiffs. Specifically, on September 26, 2001, John Saul, Warranty Service Manager for Basheer & Edgemore, noted in his 90 day inspection report of the Plaintiffs' Property that the Radon mitigation system had not been installed and that this information "was not conveyed to owner." John Saul did not advise the plaintiffs of the absence of the Radon mitigation system because in his view he worked for the builder and was not a home inspector. Specifically, on October 5, 2001, Robert Broy, Warranty Service Employee for Basheer & Edgemore, wrote a memorandum to the file that the Radon mitigation system had not been installed. Neither Mr. Broy nor Basheer & Edgemore ever informed the Plaintiffs of this failure to install the Radon mitigation system. The concealment of these facts from the Plaintiffs was done willfully, knowingly and intentionally, and was intended to conceal from the Plaintiffs the failure of the Defendants to perform their obligations under the Agreement.

92. These misrepresentations were made to make a sale that Basheer & Edgemore would not have been able to make to these Plaintiffs without the misrepresentations.

93. The Plaintiffs purchased the Property in justifiable reliance on Basheer & Edgemore's misrepresentations

and have suffered monetary damage and great inconvenience.

94. Basheer & Edgemoore acted with actual malice toward the Plaintiffs and Basheer & Edgemoore acted under circumstances amounting to a willful and wanton disregard of the Plaintiffs' rights.

95. In order to put the Property in the condition as contracted for by the Plaintiffs and to correct the defects, it will cost in excess of \$350,000.00.

WHEREFORE, on Count III the Plaintiffs seek an award of compensatory damages against Defendants Basheer/Edgemoore-Southampton L.L.C. and Basheer/Edgemoore General Partnership for an amount to be proven at trial as well as money spent by the Plaintiffs in an attempt to make such repairs or alterations themselves as well as punitive damages in the amount of THREE HUNDRED FIFTY THOUSAND DOLLARS (\$350,000.00) and for such other and further relief as may seem appropriate to the Court under the circumstances of this case.

COUNT FOUR  
ACTUAL FRAUD  
(All Defendants)

96. Plaintiffs reallege and incorporate by reference herein the allegations contained in numbered paragraphs one (1) through fifty-three (53) above.

97. The Defendants, pursuant to the terms of the Agreement, were required to install a Radon mitigation system. The Defendants knew they were required to install a Radon mitigation system pursuant to the terms of the Agreement and intentionally and willfully failed to install the Radon mitigation system and intentionally and willfully concealed this fact from the

Plaintiffs. Specifically, on September 26, 2001, John Saul, Warranty Service Manager for Basheer & Edgemoore, noted in his 90 day inspection report of the Plaintiffs' Property that the Radon mitigation system had not been installed and that this information "was not conveyed to owner." John Saul did not advise the plaintiffs of the absence of the Radon mitigation system because he stated he worked for the builder and was not a home inspector. Specifically, on October 5, 2001, Robert Broy, Warranty Service Employee for Basheer & Edgemoore, wrote a memorandum to the file that the Radon mitigation system had not been installed. Neither Mr. Broy nor Basheer & Edgemoore ever informed the Plaintiffs of this failure to install the Radon mitigation system.

98. The concealment of these facts from the Plaintiffs was done willfully, knowingly and intentionally, and was intended to conceal from the Plaintiffs the failure of the Defendants to perform their obligations under the Agreement.

99. These actions constitute actual fraud by the Defendants.

100. As a result of a series of tests, the Plaintiffs have determined that the Radon levels in their home grossly exceed the standards established by the federal Environmental Protection Agency.

101. As a result of the Defendants' intentional concealment of the fact that the Radon mitigation system had not been installed, the Plaintiffs have lived in a house with unsafe levels of Radon.

102. As a further result of Defendants' actions, the Plaintiffs have been deprived of the use and enjoyment of a substantial portion of their house for an extended period of time.



103. As a further result of Defendants' actions Plaintiffs suffered severe mental and emotional distress.

104. As a further result of Defendants' actions, Plaintiff Un Sun Craig suffered injury and pain to her right arm and shoulder because of the necessity of moving heavy objects in order to effectuate repairs of cement cracks required to be repaired in order to install the Radon mitigation system.

105. As a further result of Defendants' actions, Plaintiffs suffered monetary losses for necessary testing and installation of a Radon mitigation system.

WHEREFORE, the Plaintiffs seek an award of compensatory damages in the amount of FIVE HUNDRED THOUSAND DOLLARS (\$500,000.00), an award of punitive damages in the amount of THREE HUNDRED FIFTY THOUSAND DOLLARS (\$350,000.00), an award of their costs, expenses and attorneys fees, and such other and further relief as may seem appropriate to the Court under the circumstances of this case.

COUNT FIVE  
CONSTRUCTIVE FRAUD  
(All Defendants)

106. Plaintiffs reallege and incorporate by reference herein the allegations contained in numbered paragraphs one (1) through fifty-three (53) above.

107. The Defendants, pursuant to the terms of the Agreement, were required to install a Radon mitigation system. The Defendants knew they were required to install a Radon mitigation system pursuant to the terms of the Agreement and intentionally and willfully

failed to install the Radon mitigation system and intentionally and willfully concealed this fact from the Plaintiffs. Specifically, on September 26, 2001, John Saul, Warranty Service Manager for Basheer & Edgemoore, noted in his 90 day inspection report of the Plaintiffs' Property that the Radon mitigation system had not been installed and that this information "was not conveyed to owner." John Saul did not advise the plaintiffs of the absence of the Radon mitigation system because he stated he worked for the builder and was not a home inspector. Specifically, on October 5, 2001, Robert Broy, Warranty Service Employee for Basheer & Edgemoore, wrote a memorandum to the file that the Radon mitigation system had not been installed. Neither Mr. Broy nor Basheer & Edgemoore ever informed the Plaintiffs of this failure to install the Radon mitigation system.

108. The concealment of these facts from the Plaintiffs was done willfully, knowingly and intentionally, and was intended to conceal from the Plaintiffs the failure of the Defendants to perform their obligations under the Agreement.

109. These actions constitute constructive fraud by the Defendants.

110. As a result of a series of tests, the Plaintiffs have determined that the Radon levels in their home grossly exceed the standards established by the federal Environmental Protection Agency.

111. As a result of the Defendants' intentional concealment of the fact that the Radon mitigation system had not been installed, the Plaintiffs have lived in a house with unsafe levels of Radon.

112. As a further result of Defendants' actions, the Plaintiffs have been deprived of the use and enjoyment

of a substantial portion of their house for an extended period of time.

113. As a further result of Defendants' actions, Plaintiffs suffered severe mental and emotional distress.

114. As a further result of Defendants' actions, Plaintiff Un Sun Craig suffered injury and pain to her right arm and shoulder because of the necessity of moving heavy objects in order to effectuate repairs of cement cracks required to be repaired in order to install the Radon mitigation system.

115. As a further result of Defendants' actions, Plaintiffs suffered monetary losses for necessary testing and installation of a Radon mitigation system.

WHEREFORE, the Plaintiffs seek an award of compensatory damages in the amount of FIVE HUNDRED THOUSAND DOLLARS (\$500,000.00), an award of punitive damages in the amount of THREE HUNDRED FIFTY THOUSAND DOLLARS (\$350,000.00), an award of their costs, expenses and attorneys fees, and such other and further relief as may seem appropriate to the Court under the circumstances of this case.

#### COUNT SIX VICARIOUS LIABILITY (All Defendants)

116. Plaintiffs reallege and incorporate by reference herein the allegations contained in numbered paragraphs one (1) through (53) fifty-three above.

117. The partners of the Basheer & Edgemoore partnership are Diane Cox Basheer Communities, Inc., Edgemoore Homes, L.L.C., Basheer/Edgemoore - Southampton, L.L.C., Basheer/Edgemoore -

Westhampton, L.L.C. and possibly other entities or persons.

118. In advertising, marketing, construction, sharing of employees, sharing of contractor licenses, and prolific use of the trade name Basheer & Edgemoore, Diane Cox Basheer Communities, Inc., Edgemoore Homes, L.L.C., Basheer/Edgemoore-Southampton, L.L.C. and Basheer/Edgemoore-Westhampton, L.L.C. and possibly other entities or persons have held themselves out to the public as a Virginia general partnership and have operated as a partnership by estoppel.

119. Prior to the licensing of Basheer/Edgemoore Southampton, L.L.C., Basheer & Edgemoore relied upon the contractor's license for Basheer/Edgemoore - Westhampton, L.L.C. to obtain building permits and commence work on the Property under the Agreement.

120. In advertising material for the Property which was provided to the Plaintiffs and to the general public Basheer & Edgemoore held itself out to be a partnership of Defendants Diane Cox Basheer Communities, Inc. and Edgemoore Homes, L.L.C. See Exhibit B.

121. In a letter to the Plaintiffs dated May 24, 2000, which transmitted a copy of the contract to purchase the Property; a letter dated April 13, 2001, which set the closing date for the purchase of the Property; and a letter dated May 3, 2001 which transmitted a copy of the Warranty for the Property, Defendants Diane Cox Basheer Communities, Inc. and Edgemoore Homes, L.L.C. held themselves out to be a partnership trading under the name Basheer & Edgemoore. See Exhibit 3.

122. Defendants Diane Cox Basheer Communities, Inc., Edgemoore Homes, L.L.C., Westhampton, L.L.C., Southampton, L.L.C., and share employees and officers

with one another while operating under the name Basheer & Edgemoore.

123. In reliance upon the existence of the general partnership as described above, Stephen V. Craig and Un Sun H. Craig entered into a contract with the general partnership. Specifically, on or about May 20, 2000, Stephen V. Craig and Un Sun H. Craig entered into an Agreement of Purchase and Sale (the "Agreement") of 7545 Laurel Creek Lane, Springfield, VA 22150 (also referred to as "Lot 36" and the "Property") in Fairfax County, Virginia with Basheer/Edgemoore - Southampton, L.L.C., trading as Basheer & Edgemoore, a member of the general partnership.

124. As alleged in Count I, Basheer & Edgemoore breached its warranty to the Plaintiffs.

125. As alleged in Count II, Basheer & Edgemoore violated the Virginia Consumer Protection Act.

126. As alleged in Count III, Basheer & Edgemoore fraudulently induced the Plaintiffs to enter into the Agreement.

127. As alleged in Count IV, Basheer & Edgemoore committed actual fraud.

128. As alleged in Count V, Basheer & Edgemoore committed constructive fraud.

129. All of the acts alleged herein were conducted by partners of the Basheer & Edgemoore general partnership in furtherance of the Basheer & Edgemoore partnership business.

130. As partners-in the Basheer & Edgemoore general partnership, Diane Cox Basheer Communities, Inc., Edgemoore Homes, L.L.C., Basheer/Edgemoore - Southampton, L.L.C., and Basheer/Edgemoore-Westhampton, L.L.C., are jointly and severally liable for the debts of the partnership and liable for the torts conducted in furtherance of the partnership.

WHEREFORE, the Plaintiffs seek a finding of joint and several liability against Diane Cox Basheer Communities, Inc., Edgemoore Homes, L.L.C., Basheer/Edgemoore - Southampton, L.L.C., and Basheer/Edgemoore - Westhampton, L.L.C. in the amount of FIVE HUNDRED THOUSAND DOLLARS (\$500,000.00), an award of punitive damages in the amount of THREE HUNDRED FIFTY THOUSAND DOLLARS (\$350,000.00), an award of their costs, expenses, and attorneys fees, and such other and further relief as may seem appropriate to the Court under the circumstances of this case.

Respectfully submitted,

Danle F. Rinzel VS #471  
E. Andrew Burcher., VSB#41310  
REDMON, PEYTON & BRASWELL, LLP  
510 King Street, Suite 301  
Alexandria, VA 22314  
Counsel for Plaintiffs



BOCA-Certified Code Inspector (Bldg., Mech., Elec., Plumb.); CABO-Certified Building Official; Member, American Society of Home Inspectors; New Residential Construction Expert 28 Years of Experience

Neil Swanson Home Inspections

Neil E. Swanson

7180 Baldwin Ridge Road Warrenton, VA 20187 540-349-7862

December 10, 2004

Col. and Mrs. Stephen Craig 7545 Laurel Creek Lane  
Springfield, VA 22150

Dear Col. and Mrs. Craig:

I am pleased to submit this report of my inspections on May 15, 2003, June 17, 2003, and December 6, 2004 of the house at 7545 Laurel Creek Lane, Springfield, VA 22150. The December 6 installment of this inspection was a relatively brief reinspection at which time it was observed that almost all of the defects noted on the previous two visits remained uncorrected. Most of the few exceptions are at defects previously found in the sump crock area. where corrections had reportedly been made at the homeowner's expense in order to deal with the radon hazard. One other corrected condition noted was at the area of the main water shutoff where a leak was no longer observed; this also was reportedly corrected by the homeowner's plumber. The only defects added to the list on December 6 were defects #1.10,13.15,17.12, and 17.13.

Because of the time required to inspect many important components on this house, there may not have been time to address in this report some of your expressed concerns or other obvious defects. This does not mean that these are unimportant. Therefore, along with this report, you should submit to your builder in a timely manner a list of any other concerns.

### DISCLAIMER

This report is based only on those visible conditions observed on the dates of inspection. No representation is made regarding latent or concealed defects, and no warranty is expressed or implied. This report is made only in the best exercise of my ability and judgment.

Even though my analysis of some conditions on this house may turn out to be more accurate than that of some so-called "specialists" in the disciplines involved, I am not a specialist in these disciplines and do not necessarily have available all of the knowledge and other tools of analysis available to a qualified specialist. This report is offered only as the opinion of a general practitioner in the broad, multi-disciplinary field of new home construction.

Please call me if you have any questions.

Sincerely,  
Neil E. Swanson Building Consultant

Section III: Summary of Code-Related Defects Only  
7545 Laurel Creek Lane  
Springfield, VA 22150 May 15, June 17, 2003 and  
December 6, 2004

Each defect listed below was found in at least one location on this house. Similar mistakes are likely to have occurred in other locations. Therefore, the builder should check all similar components for similar defects. Any example given should be treated as one example and not as the only instance.

1. Structure: A state-licensed professional structural engineer familiar with residential construction should be consulted regarding an defects listed in this "structure" section.

1.1. C'-No foundation returning around front right corner of garage under sill plate and jack studs; treated jack studs instead appear to have been extended all the way down to slab but appear to not have been secured and are therefore vulnerable to shifting too easily if attached trim board is clipped by a car in a manner that would generally only damage trim and not move structural components.

1.2. C'-Out-of-plumb floor joists over bearing area, e.g., left end of dining room joist 19" in from rear; other examples were seen at beam ends of most of sun room joists which almost all lean slightly toward rear; other examples are seen at dining room ends of some kitchen floor joists; check other areas.

1.3. C'-One or more holes through joist webbing too large given closeness of holes to joist bearing (see manufacturer's specs), e.g., on dining room joist 19" in from rear where 8" square hole has been put through webbing about 4' from bearing point.

1.4. C'-Basement stairs landing joists need joist hangers at front ends; one or more of these joists are toenailed from only one side. Rear ends of some of these joists also not soundly supported.

1.5. C'-One or more steel columns in basement extending through slab where an opening had to be cut out through slab indicating that any original footing in this area was probably not centered under point where column has been placed, e.g., column near door to unfinished area of basement; opening does not appear to have been cut out far enough to easily dig proper footing under this area; homeowner should at least be provided with certification that proper footing corrections were made here and inspected by county.

1.6. C'-Joist hangers supporting header joist near furnace/water heater vent (chimney) not adequate for providing support here on these manufactured joists, since these joist hangers have been altered by cutting off top ends (at at least one side of each hanger) that needed to lap over joists at each end of header.

Also, joist hanger supporting cut-off joist has been rebent at top, leaving it hanging down so that it does not reliably support this joist at proper level.

1.7. C'-Roof truss lateral bracing not installed where likely required by truss manufacturer such as on 5' or longer members transferring top chord load to bearing walls (check truss drawings), e.g., across front end of at least half of main trusses and across rear ends of at least four trusses (where some bracing is obviously on wrong members, since on undersides of top chords); check elsewhere.

1.8. C'-Broken roof trusses repaired in inadequate manner, e.g.,

- a) approximately 6' down from ridge on truss 2' to right (plan view) from attic access opening; here top chord is broken apart;
- b) approximately 10' down from ridge on same truss where gusset plates are completely disconnected at top end of a vertical member which has been left extending up beside top chord with three nails reattaching it all in same grain of top chord and all within 1/2" of top of vertical member;
- c) at truss 4' to right of attic access opening where there are additional example of inadequately repaired, disconnected gusset plates and a split top chord;
- d) at truss 6' to right of attic access opening where separated gusset plate have also not been adequately repaired.

Check others.

1.9. C'-Inadequate support of narrow roof sheathing strips at ridge.

1.10. C'-Framing of house (especially floors) not in conformance with approved plans. (2. Basement

2.3. C'-Hole through basement slab not adequately sealed, e.g., down between two crowded-together sump crocks; check others.

### 3. Electrical System

3.1. C'-25-amp breaker in panel exceeds 20-amp maximum on sun room AC rating plate.

3.2. C'-Circuit identification in panel inadequate, e.g., which system served by which AC breaker since no numbers are provided on AC condenser units to correspond to numbers indicated in panel; also, numbers on AC breakers in panel are not consistent with numbers indicated on some heating system breakers. (Consistent numbering needs to be provided for: all heating/cooling interior equipment; all

heating/cooling exterior equipment; all exterior AC disconnects.)

3.3. C'-Some recessed light fixtures not remaining properly positioned against ceiling, e.g., recessed fixtures in master bath; check all recessed fixtures.

3.5. C'-Large junction box in kitchen island cabinet includes no screws in cover, leaving potential shock hazard since cover slides right off this box.

#### 4. Plumbing System\_\_

4.1. C'-Water meter cock jammed tightly against critical main shutoff valve.

4.2. C'-Shutoff valve at water meter cock partly closed; part of problem may be conflict of valve with side of meter cock, as noted in previous item.

4.3. C'-Hose bibb not secure in wall, e.g., front hose bibb which pulls right out and rotates in brick; check others.

4.4. C'-Water standing in exterior portion of areaway drain line due to apparent reversed slope or obstruction or intentional trap below drain; such a condition can cause ice or sediment to further obstruct flow in pipe.

4.5. C'-Sump pump discharge pipe unattractively extending out over foundation wall instead of extending down inner side of foundation wall to come out lower through foundation in line with standard good practice; presently pipe unattractively extends down at distance of about 6" off foundation and is not even adequately secured and is likely to occasionally send water outside instead of into buried foundation drain.

4.6. C'-Copper against steel, e.g., at kitchen exhaust duct offsetting around some copper pipes just below range; check other areas.

4.7. C'-Continuous, slow leak at connection of plastic water service entrance line to copper interior main water line.



4.8. C'-Sump pump not coming on at all (even when tethered-type float is turned upside down into "on" position) in sump crock serving foundation drains.

4.9. C'-Check valve on above sump pump discharge line installed upside down; flat side of this type of check valve needs to face up when valve is installed in horizontal position as is case here.

4.10. C'-Debris in foundation drain sump crock; same problem seen on sump crock serving areaway drain.

4.13. C'-Check valve on areaway drain sump pump discharge line not adequately tightened at any of four hose clamps on this rubber check valve; valve blew apart when pump was brought on; check valve was reconnected and tightened at all four clamps during this inspection, but should be rechecked.

4.15. C'-Areaway drain sticking up slightly above surface of areaway landing, thus increasing chance of silt, water, and ice puddling here.

4.19. C'-Toilet in buddy bath obviously relocated from crooked earlier position, but left with a) caulk residue on tiles outlining earlier position of toilet;

b) no caulk reinstalled around base of toilet; c) cracked tiles at back side of toilet.

#### 5. Heating and Cooling Systems Lower system

5.1.3. C'-Likely oversized outside air intake (7" duct and 7" wall cap) wasting energy; check calculation for sizing outside air intake. (This size may be needed due to large number of gas appliances in this house, but certainly the second one is not needed as is addressed further on sun room system.)

5.1.4. C'-No flanges at front of filter slot to help retain filter from collapsing and to discourage unfiltered air from sneaking around filter; filter found beginning to collapse in toward furnace at front of filter track due to this lack of flanges. 5.1.5. C'-Filter not high-velocity

type specified by manufacturer; oversized filter slot which has been provided here (allowing use of oversized, low-velocity filter) is not enough to make up for reduced velocity of present disposable filter, since effective filter cross-section is not increased significantly when filter slot is not adequately set back away from smaller original opening and since edge of furnace case has been bent out toward filter, effectively blocking even partial flow through upper portion of filter.

5.1.6. C'-Apparent condensate leak onto furnace, e.g., some rusting on burner area.

5.1.7. C'-Duct air flow restricted by sharp flex duct turn at straight takeoff, e.g., on basement return duct connecting to return grill box; check others.

Upper system

5.2.2. C'-Drain-clogging insulation in overflow pan in attic.

5.2.3. C'-Air leaks at coil case; rubber grommets intended to seal around AC refrigerant lines were found lying on service platform.

5.2.4. C'-Gaps open between burner area and fan compartment; regional service manager for York International (Allan Maroney at 1-800-290-3818 x 221) says that these holes should be closed in some manner such as with "dumdum." 5.2.5. C'-Gaps opening in taped seal of return plenum to furnace case, e.g., at one side of plenum.

5.2.6. C'-Uninsulated, bare metal walls of fan portion of furnace case exposed in attic. Sun room system

5.3.1. C'-Thermostat located where it can be hit by direct sun at some times of year.

5.3.2. C'-Too little room left for wall or duct insulation between heating trunk and foundation wall, e.g., at sun

room furnace and all related nearby supply and return ductwork.

5.3.3. C'-Air leaks at coil case, especially at large, round hole in coil case.

5.3.5. C'-Apparent condensate leak onto furnace, e.g., rust occurring at top and bottom of blower compartment. 5.3.7. C'-Apparent oversized outside air intake (7" duct and 7" wall cap) wasting energy; check calculation for sizing outside air intake. (No intake at all likely needed on this system since 7" outside air intake has been provided on main lower system, and sun room system will not necessarily run frequently enough to provide reliable air intake for other gas appliances in house; present outside air intake on this system is likely to result in drawing almost 113 of this system's return air from outside. One of problems this is likely to cause in addition to inefficiency is that it will in cold weather be sending colder mix of air across heat exchanger than is permitted by furnace manufacturer's specifications.)

General heating problems

5.4.1. C'-Multiple systems run into shared condensate drain; here all three systems are sharing at least last portion of this drain line where it turns down into drain.

5.4.2. C'-Shared condensate drains have been pulled loose from floor and raised at drain, adding additional trapping of water in these lines; shared portion of drain turning down into floor drain also has not been cut through floor drain to reduce high likelihood of obstruction occurring here where 3/4" drain line ends against strainer in floor drain.

5.4.3. C'-Heating and cooling likely to be uneven and inefficient given defects noted above. 6. Appliances and Kitchen

6.1. C'-Kitchen exhaust duct leaking air significantly in basement ceiling in area below range; this duct also has other problems noted in other items.

6.2. C'-Kitchen exhaust duct includes combination of elbows and length that may not meet appliance manufacturer's installation specifications; check instructions which may require upsizing of this duct.

6.3. C'-Granite countertop on kitchen peninsula not adequately secured in place and shifting causing cracks to open between this section of marble top and sink section and between this section of marble top and wall-mounted granite backsplash; part of problem may be unstable support under countertop where cabinets have reportedly been shifted to better align them with floor, etc.; countertop attachment to cabinets at this section of countertop includes unattractive and too soft cedar shims sticking out beyond cabinet and dishwasher.

Crack has also opened between sink section and range section; cracks open in countertop surface, especially near sink, too easily allow liquids from countertop work surface to run down through top.

#### 17. Energy Savings and Ventilation

7.1. C'-Bath exhaust fan wall cap flap not opening sufficiently, e.g., main-level powder room wall cap and basement bath wall cap; check all wall caps.

7.2. C'-Out-of-position or missing bandboard insulation, e.g., below rear of sun room where insulation has been ineffectively placed on second joist in from end; other examples of out-of-place bandboard insulation are above electric panel and around radon vent; check other areas.

7.3. C'-Foundation wall insulation missing behind sun room furnace, supply plenum, return plenum, and return trunk where these components have all been installed too close to foundation but still have some

room behind them into which some insulation should be installed, especially since greater heat loss can occur here because of greater difference between air in some of these components and temperature of foundation wall.

7.4. C'-Daylight visible from in basement around AC refrigerant lines where proper air infiltration seal is needed at subsiding in addition to better rain seal at exterior siding.

7.5. C'-Inadequately insulated attic access panel; present piece of insulation too long to slide down into access opening easily.

7.6. C'-Firestopping inadequate at upper-level ceiling, e.g., at top of wall or dead space where considerable air has been leaking out house into attic as indicated by discoloration of insulation in this area off right rear (plan view) corner of attic furnace platform; an open gap can be seen here when insulation is parted; check other areas.

7.7. C'-Inadequately positioned attic insulation retainers, e.g., in center of left end of attic where bottom of one retainer is unattached and pushed out onto soffit, leaving gaps open at each side of it; another retainer two trusses away is detached at one side and hanging down; check others.

7.8. C'-Inadequate ceiling insulation depth, e.g., at left end of attic where insulation averages only about 10" instead of the 12" required with the type of insulation used here in order to provide an R value of 30; check other areas.

7.9. C'-No access to attic space with 30"-plus headroom, e.g., over MBR rear extension; check others. 8. Fireplaces and Chimneys

9. Floors and Stairs

9.1. C'-Many kitchen floor tile grout joints cracking due to apparent excessive deflection from inadequate stiffness of floor for tile support.

9.2. C'-Noises indicating apparent loose subfloor or loose hardwood, e.g., carpeted family room, hardwood living room and other areas; check other areas.

9.3. C'-Creaking stairs treads, e.g., on main stairs and on basement stairs; check others.

9.4. C'-Incorrect riser top of basement stairs; this condition may have evolved from failure to properly plan for tile floor when stairs were installed.

9.5. C'-Subfloor of lower half of landing in basement stairs loose and rattling when stepped on.

9.11. C'-Excess space in guard rail, e.g., at turn in upper hall guardrail approximately above base of main stairs where space is 4 1/2"; another 4 1/2" space is beside first step above landing in main stairs; other spaces that exceed 4" maximum were noticed at one end of guardrail above family room and at lower winder treads in main stairs; check others.

9.14. C'-Incorrect riser top of main stairs where riser is 8 3/4" instead of 8 1/4" maximum permitted as seen at most of other steps in these stairs.

9.15. C'-Tread depths in main stairs do not meet code since one or more treads (measured from nosing to nosing) are less than 9" deep, such as tread just below landing where 1 1/2" overhang of landing nosing reduces 10" total tread below it to 8 1/2"; this tread also differs more than permitted from some other treads in this same run of stairs.

9.21. C'-Unnecessary trip hazard between laundry and tiled kitchen floor where laundry floor is not raised to match kitchen floor, further indicating that kitchen floor was apparently not properly planned for.

## 10. Walls and Ceilings



10.1. C'-Firestopping at openings in first-floor subfloor inadequate, e.g., around kitchen exhaust duct; check others.

10.4. C'-Drywall loose and rattling when bumped at wall between master bath shower and vanity, indicating some possible missing framing in this wall, or at least inadequate attachment; same rattling present on shower side of wall where firm support of drywall is especially needed to avoid cracking of grout joints in tile. Good practice is to provide a stud every 16" in walls to be tiled.

Problems with proper planning and execution of wall framing in this area is indicated by fact that a medicine cabinet was not installed here where one was supposed to go, due apparently to some conflicts in this wall.

#### 11. Windows and Doors

11.2. C'-Necessary amount of space missing between masonry window sills and bottoms of windows or related trim. Such space (which should be filled only with flexible material such as caulk) needed (even if not explicitly specified by some window manufacturers) to accommodate house framing shrinkage and settling which can exert excessive force on windows bridging between framing and masonry veneer.

Evidence of downward movement of windows in relation to brick veneer can be seen already at upper-level windows where most of caulk has cracked along sides and top.

11.3. C'-One or more window screens not properly positioned and secured, e.g., at upper-level windows above study and at pair of windows high on left end of house; check all windows.

11.8. C'-Threshold loose and rattling when stepped on at one or more doors, e.g., house garage door; check others. 11.9. C'-Air leak at door, e.g., at house/garage

door where sweep is not contacting threshold; check others.

11.12. C'-One or more windows stuck shut, e.g., in front center room where neither window will open; check others. 11.13. C'-Primary egress door intermittently binding severely, apparently in response to moisture; check for leaks and swelling of framing, etc.

## 12. Roof

12.1. C'-Metal roof areas uncounterflushed, e.g., at bases of front gables; check others.

12.2. C'-Single-membrane roof on front porch has been done in substandard manner in numerous respects that do not conform to usual specifications of manufacturers of this type of roof covering:

1) membrane has not been installed over sound, smooth surface. For example, there appear to be lumps under membrane.

2) roof has not been properly sloped to avoid ponding.

3) no reflective coating has been provided to protect this roof from UV damage.

The builder should provide the homeowner with specifications from the roof manufacturer that indicate that this type of roof is warranted for use on detached residential construction.

12.3. C'-Drip edge along front of front porch roof installed over top of roof membrane instead of underneath it as is proper practice and as is seen at each end of this roof.

12.4. C'-Front porch roof unnecessarily sending water right off onto front porch steps which can cause hazardous icing and unattractive moss, especially on shady north side of house; diverter installed across front of roof only extends along railing columns and then angles in to center of roof, leaving an area of roof still draining off at front and leaving odd appearance as

compared with a more consistent diverter all the way across front edge.

12.5. C'-Front porch roof membrane penetrated at numerous spots by dozens of small nails shot down through it as toenails securing columns on porch; wind shaking columns of front porch roof railing can wiggle nails and increase likelihood of leak developing here.

12.6. C'-Metal ridge vent crushed down allowing no significant ventilation along at least 3' of right end of highest ridge; check all ridge vents.

12.7. C'-Apparent leak evidence in ceiling insulation in attic below furnace vent flashing at both furnace vents; from attic one can see up between storm collar and furnace vent on each vent indicating no proper seals.

### 13. Exterior Surfaces

13.2. C'-Rusting fasteners not set and filled or otherwise protected, e.g., in trim above high foyer window and in boards securing front porch railing to brick; check others.

13.4. C'-Missing or inadequate brick weep holes in some areas of masonry veneer, e.g., across entire front of living room and at tops and bottoms of all front windows; check all areas of masonry veneer.

13.5. C'-Inadequate corrosion protection on exposed steel lintels supporting masonry, e.g., at at least one garage overhead door; check all lintels.

13.6. C'-Unattractive, rough lumber build-out behind electric meter base including untreated lumber, uncaulked seams, rusting non-corrosion-resistant screws, etc., even though this is at front of house.

13.8. C'-Caulk needed where missing or cracked, e.g., at front of sun room where many vertical joints at windows and trim are uncaulked, and one narrow space created by problem noted above is not even painted; another example is around family room rear window

where deep gap is covered with thin layer of caulk which is already cracking away; check all exterior caulk.

13.13. C'-Trim and/or finishing incomplete above basement windows, e.g., window below rear of family room where finishing is especially unattractive when seen from interior; check others.

13.15. C' -Vinyl siding improperly installed. . Porches and Garages

14.3. C'-Columns on front porch roof railing supported at front edges on strips of untreated lumber sitting down directly on roof in areas of roof that puddle water, as indicated by moss and sediment that have accumulated here.

14.4. C'-Climbable guard rail on areaway.

14.5. C'-Rusting steel railing, e.g., areaway rail; check others. 14.7. C'-Garage door drops unsafely.

15. Grounds

15.1. C'-Excessive driveway steepness.

15.3. C'-Rear yard soil brought up inappropriately steeply to foundation at rear along morning room and areaway; this creates a) need for window wells that obstruct view and daylight at basement windows; b) unnecessary degree of slope in only potentially usable area of rear yard; c) false justification for extra-tall and unattractive areaway wall;

d) unsafe condition at areaway retaining wall where even total of concrete wall and metal railing is less than required 36" guardrail height required for railing alone.

15.4. C'-At least one area of yard steeper than 3:1 maximum slope considered safe for mowing and avoiding erosion, e.g., off right end of house where slope is approximately 2 1/2 to 1; lowering of soil at house or addition of retaining wall likely to be needed here.

**16. Gutters and Drainage**

16.1. C'-Inadequate drainage slope over backfill near foundation, e.g., around sewer cleanout near front hose bibb where there is actually reversed slope; also along left end of house, especially under fireplace bay; check other areas.

**17. Miscellaneous**

17.4. C'-Rusty pipes at gas meter due to inadequate painting.

17.5. C'-Gap below shingle edge open into attic where roof sheathing and top of fascia board do not meet properly, e.g., toward rear from attic access opening where there is also fair-sized hornets' nest, apparently as result of this or other unscreened gaps open into attic; check other areas.

5/15,6/17103,12/6104-Inspection on 7545 Laurel Creek Lane, Springfield, VA 22150 Neil Swanson Home Inspections - (540) 349-7862

**United States Constitution, Amendment XIV,  
Section 1:**

...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law....

**Virginia Code Section 50-73.88(A):**

Except as otherwise provided in subsection B, the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership.

**Virginia Code Section 50-73.97(A), (B), (D)(2) & (E):**

(A) A partnership may sue or be sued in the name of the partnership;

(B) An action may be brought against the partnership and, except as provided in Section 50-73.96, against any or all partners in the same action or in separate actions.

....

(D) A judgment creditor of a partner may not levy execution against the assets of the partner to satisfy a judgment based on a claim against the partnership unless:

...(2) Liability is imposed on the partner by law or contract independent of the existence of the partnership.

(E) this section applies to any partnership liability or obligation resulting from a representation by a partner or purported partner under Section 50-73.98.



**Virginia Code Section 50-73.98. Liability of a purported partner:**

(A) If a person, by words or conduct, purports to be a partner, or consents to being represented by another as a partner, in a partnership or with one or more persons not partners, the purported partner is liable to a person to whom the representation is made, if that person, relying on the representation, enters into a transaction with the actual or purported partnership. If the representation, either by the purported partner or by a person with the purported partner's consent, is made in a public manner, the purported partner is liable to a person who relies upon the purported partnership even if the purported partner is not aware of being held out as a partner to the claimant. If partnership liability results, the purported partner is liable with respect to that liability as if the purported partner were a partner. If no partnership liability results, the purported partner is liable with respect to that liability jointly and severally with any other person consenting to the representation.

(B) If a person is thus represented to be a partner in an existing partnership, or with one or more persons not partners, the purported partner is an agent of persons consenting to the representation to bind them to the same extent and in the same manner as if the purported partner were a partner, with respect to persons who enter into transactions in reliance upon the representation. If all of the partners of the existing partnership consent to the representation, a partnership act or obligation results. If fewer than all of the partners of the existing partnership consent to the representation, the person acting and the partners

consenting to the representation are jointly and severally liable.

(C) A person is not liable as a partner merely because the person is named by another in a statement of partnership authority.

(D) A person does not continue to be liable as a partner merely because of a failure to file a statement of dissociation or to amend a statement of partnership authority to indicate the partner's dissociation from the partnership.

(E) except as otherwise provided in subsections A and B, persons who are not partners to each other are not liable as partners to other persons.

**Virginia Code Section 59.1-69(A):**

(A) No person, partnership, limited liability company or corporation shall conduct or transact business in this Commonwealth under any assumed or fictitious name unless such person, partnership, limited liability company or corporation shall sign and acknowledge a certificate setting forth the name under which such business is to be conducted or transacted, and the names of each person, partnership, limited liability company or corporation owning the same, with their respective post-office and residence addresses...and file the same in the office of the clerk of the court in which deeds are recorded in the county or city wherein the business is to be conducted.

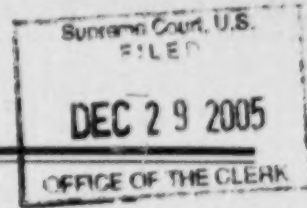
**Virginia Code Section 59.1-70(A):**

When business is conducted in this Commonwealth under an assumed or fictitious name by...a limited liability company..., such limited liability

52a

company...shall file in the office of the clerk of the State Corporate Commission a copy of the certificate described in Section 59.1-69, duly attested by the clerk of the court in which the original is on file....

No. 05-693



IN THE  
**Supreme Court of the United States**

STEPHEN V. CRAIG AND UN SUN H. CRAIG,

*Petitioners,*

v.

BASHEER & EDGEMOORE, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF VIRGINIA

**BRIEF IN OPPOSITION**

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## **QUESTIONS PRESENTED**

1. Does the Supreme Court of the United States have jurisdiction to review this civil, state law matter, when Petitioners have failed to present a federal issue in any of the state court proceedings?

2. Did the Circuit Court of Fairfax County, Virginia, as affirmed by the Supreme Court of Virginia, properly hold, on four separate occasions, that Petitioners failed to state claims upon which relief could be granted, based upon the express language of a contract between Petitioners and Basheer/Edgemore-Southampton, L.L.C. and based upon clear tenets of Virginia law?

**CORPORATE DISCLOSURE STATEMENT**

None of the corporate Respondents have a parent company and no publicly held corporation owns 10% or more of the stock of any such Respondent.



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## STATEMENT OF THE CASE

As an initial matter, it must be noted that Respondents disagree with and contest virtually all of the factual allegations made by Petitioners, Stephen and Un Sun Craig ("Mr. and Mrs. Craig"), in their Petition for Writ of Certiorari ("Petition"), except as set forth herein. These allegations are mere self-serving conjecture which have never been introduced as evidence in any court of law.

Mr. and Mrs. Craig filed their initial Motion for Judgment in the Circuit Court of Fairfax County ("Trial Court") on or about October 24, 2002 ("Original Litigation"), arising from the purchase and sale of a lot and a new home located at 7545 Laurel Creek Court, Springfield, Virginia 22150, in the Southampton subdivision ("Property"), and memorialized by the terms and conditions of a Purchase and Sale Agreement ("Agreement"), dated May 20, 2000, between Mr. and Mrs. Craig and Appellee, Basheer/Edgemoore-Southampton, L.L.C. ("Southampton"). The opening sentence of the Agreement expressly provided:

By this Agreement, made this May 20, 2000, by  
*and between Basheer/Edgemoore-Southampton,  
L.L.C., trading as Basheer & Edgemoore,  
(hereinafter referred to as "Seller"), and Stephen  
V. and Un Sun H. Craig (hereinafter referred to  
as "Purchaser"), . . .*

(Emphasis added.) The Agreement clearly identified Mr. and Mrs. Craig as "Purchaser", Southampton as "Seller" and "Basheer & Edgemoore" as a mere trade name for Southampton.

Furthermore, paragraph 7 of the Agreement states, in capitalized print:

**SELLER AGREES TO PROVIDE PURCHASER  
A ONE YEAR LIMITED WARRANTY (THE  
"HOME WARRANTY").**

This express warranty obligation ("Warranty") clearly belonged to Southampton, as "Seller", and was provided to Mr. and Mrs. Craig at closing.

Mr. and Mrs. Craig closed on the purchase of the Property on or about May 7, 2001, for a purchase price of \$610,833. Pursuant to the terms and conditions of the Warranty, Southampton performed repair work on the Property through May 2002. Mr. and Mrs. Craig continued to make demands on Southampton for additional warranty work, outside of the scope of the Warranty, after May 2002. On October 24, 2002, Mr. and Mrs. Craig filed their Motion for Judgment in the Original Litigation.

In the Original Litigation, Mr. and Mrs. Craig sued numerous parties, including Diane Cox Basheer, personally, the President of Diane Cox Basheer Communities, Inc. ("Basheer Communities"), for what was essentially a construction defect/warranty claim. On January 31, 2003, the Trial Court sustained the original Defendants' Demurrer and granted Mr. and Mrs. Craig leave to amend their Motion for Judgment. The Defendants in the Original Litigation filed a Demurrer to the Amended Motion for Judgment, which again was sustained in part by the Trial Court. On or about September 24, 2003, shortly before trial and a motions hearing on Defendants' Motions in Limine, Mr. and Mrs. Craig non-suited the Original Litigation.

On January 26, 2004, Mr. and Mrs. Craig re-filed their Motion for Judgment in the Circuit Court of Fairfax County in the present matter. Mr. and Mrs. Craig filed claims for breach of warranty, violation of the Virginia Consumer Protection Act, fraudulent inducement, actual fraud, constructive fraud and "vicarious liability". They prayed for damages "in excess of \$200,000" under their warranty claim, in the amount of \$500,000 for compensatory damages, in the amount of \$350,000 for fraud-related damages, punitive damages, treble damages, costs, attorney's fees and other relief. Most importantly, Mr. and Mrs. Craig filed these claims, all which arise from the contractual relationship with Southampton, against Basheer Communities, Edgemoore Homes, L.L.C. ("Edgemoore"), Basheer/Edgemoore-Westhampton, L.L.C. ("Westhampton") and an amorphous partnership named "Basheer & Edgemoore" (collectively, "Defendants"), allegedly consisting of four (4) "partners" Southampton, Basheer Communities, Edgemoore and Westhampton.<sup>1</sup>

On or about March 5, 2004, Defendants filed a Demurrer and Plea in Bar to the Motion for Judgment. On July 16, 2004, the Trial Court sustained the Demurrer in part, granted Mr. and Mrs. Craig leave to amend, and reserved the issues presented in the Plea in Bar for an evidentiary hearing after the filing of an Amended Motion for Judgment. On August 16, 2004, Mr. and Mrs. Craig filed their Amended Motion for Judgment, their fourth attempt at properly stating claims in this matter. On September 3, 2004, Defendants filed a

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1. This Brief in Opposition is filed on behalf of Respondents, Basheer/Edgemoore-Southampton, L.L.C., Basheer/Edgemoore-Westhampton, L.L.C., Edgemoore Homes, L.L.C. and "Basheer & Edgemoore". Diane Cox Basheer Communities, Inc. will be filing its own Brief in Opposition with this Court.

Demurrer and Plea in Bar to the Amended Motion for Judgment. On December 9, 20<sup>04</sup>, the Trial Court heard argument on the Demurrer and Plea in Bar, for the fourth time in this litigation.

After reviewing detailed briefs and hearing lengthy argument from counsel, the Trial Court properly relied on the express language of the Agreement, attached to the Amended Motion for Judgment as Exhibit 1, in holding that Southampton was the only proper party to the claims alleged by Mr. and Mrs. Craig. Furthermore, in dismissing the claims for fraud, constructive fraud and violation of the Virginia Consumer Protection Act, the Trial Court properly relied on a contractual merger clause, the economic loss rule and the fact that fraud-related claims must allege a misrepresentation of a present, pre-existing fact under Virginia law.<sup>2</sup> Based upon the Trial Court's rulings, Mr. and Mrs. Craig were left with a breach of express warranty claim against Southampton.

Astoundingly, in the wake of these rulings, *Mr. and Mrs. Craig voluntarily dismissed with prejudice their breach of express warranty claims against Southampton.*<sup>3</sup> As a result

2. The Trial Court also dismissed the claim for "Vicarious Liability" for the reason that there is no such recognized cause of action in Virginia. Mr. and Mrs. Craig did not challenge the Trial Court's ruling on this issue in their appeal to the Supreme Court of Virginia.

3. It is noteworthy that from the filing of the Original Litigation in 2002, Southampton has maintained that, at its core, this case was a simple, straightforward breach of warranty case. Mr. and Mrs. Craig and Southampton had each retained expert witnesses to testify regarding alleged construction defects in the house and the

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of this voluntary dismissal, the Trial Court entered a Final Order in this matter on December 28, 2004. Mr. and Mrs. Craig filed their Notice of Appeal to the Supreme Court of Virginia on January 25, 2005. The Supreme Court of Virginia denied Mr. and Mrs. Craig's Petition for Appeal on June 28, 2005.

### **REASONS FOR DENYING THE PETITION**

- 1. Mr. and Mrs. Craig have not presented a proper claim under 28 U.S.C.A. § 1257(a) in that they have failed to present their federal claim to the state court that rendered the decision they wish to have reviewed.**

Mr. and Mrs. Craig acknowledge in their Petition that the due process claim which provides the sole basis for the appeal to this Court has never been presented to the Supreme Court of Virginia. Petition, 24. However, they argue, citing *Bouie v. City of Columbia*, 378 U.S. 347 (1964), that when a state's highest court interprets a state law in a way that is unforeseen, unexpected or indefensible, it violates the aggrieved litigant's due process rights under the Fourteenth Amendment to the United States Constitution. This argument misstates the law and mischaracterizes the rulings of the Trial Court and the Supreme Court of Virginia. Mr. and Mrs. Craig's failure to present a federal claim to the Supreme Court of Virginia is fatal to their Petition under 28 U.S.C.A. § 1257(a).

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(Cont'd)

appropriate warranty standards under the express warranty provided by Southampton. However, instead of pursuing at trial the warranty claims that made up the heart of their case, Mr. and Mrs. Craig elected to dismiss their warranty claims, with prejudice.



In order for a litigant to appeal properly a judgment from a state's highest court, they must first present their federal claim to the state court whose decision is to be reviewed. *Adams v. Robertson*, 520 U.S. 83, 86 (1997). Specifically, 28 U.S.C.A. § 1257 (a) provides, in relevant part, that:

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . .

When the highest state court is silent on a federal question before the Supreme Court, the Supreme Court assumes that the issue was not properly presented. *Adams*, 520 U.S. at 86-7, citing, *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987). The aggrieved party bears the burden of overcoming this assumption by demonstrating that the state court had an opportunity to address the federal question presented to the Supreme Court. *Board of Directors*, 481 U.S. at 550; *Webb v. Webb*, 451 U.S. 493, 501 (1981).

Mr. and Mrs. Craig argue that because the Trial Court and the Supreme Court of Virginia adopted an "unforeseen and unexpected reading of Virginia Code Section 50-73.98", they fit within a "rare exception" to 28 U.S.C.A. § 1257(a), in that their due process rights were violated as a result of these rulings. Petition, 26. This argument fails for three (3) reasons. First, Mr. and Mrs. Craig failed to present the federal

question at issue in their Petition to the Supreme Court of Virginia, even though it was available to them after the rulings of the Trial Court. Second, the cases relied upon by Mr. and Mrs. Craig for this proposition are distinguishable and inapposite. Third, the rulings of the Trial Court and the Supreme Court of Virginia were not "unforeseen and unexpected", as more fully discussed in the following sections of this Brief.

As set forth above, a petitioner must present the federal question sought to be reviewed to the highest court in the state, in order for jurisdiction to exist in the Supreme Court under 28 U.S.C.A. 1257(a). This rule protects the interest of comity between the state courts and the Supreme Court. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79 (1988). In *Adams*, this Court explained that:

"[I]t would be unseemly in our dual system of government" to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider. *Webb*, 451 U.S., at 500, 101 S. Ct., at 1893 (citations and internal quotation marks omitted). Thus, the rule affords state courts "an opportunity to consider the constitutionality of the actions of state officials, and, equally important, proposed changes" that could obviate any challenges to state action in federal court. *Illinois v. Gates*, 462 U.S. 213, 221-222, 103 S. Ct. 2317, 2323-2324 (1983).

*Adams*, 520 U.S., at 91. However, relying on *Bouie*, Mr. and Mrs. Craig have argued that:

[W]here State trial and appellate courts have interpreted their own State statute in a way that

was unforeseen, "unexpected," or "indefensible by reference to the law which had been expressed prior to the conduct in issue," in order to deny the state-court litigant an opportunity to be heard on the substantive right affected, it violates that litigant's due process rights regardless of whether he has timely or properly raised the federal issue in the State court.

Petition, 25-26. This argument is misguided for a number of reasons. First, *Bouie* involved a criminal conviction, not a civil matter between two private parties as is present here.<sup>4</sup> Second, contrary to the implication put forth by Mr. and Mrs. Craig, the aggrieved party in *Bouie* presented Due Process and Equal Protection arguments to the South Carolina Supreme Court, prior to the appeal to this Court. *Bouie*, 378 U.S. at 349. As a result, the requirements of 28 U.S.C.A. § 1257(a) were satisfied in *Bouie*, unlike this case. Had Mr. and Mrs. Craig believed that the Trial Court interpreted Virginia law in a manner that was "unforeseen" or "unexpected" so as to violate their rights of due process, they were required by 28 U.S.C.A. 1257(a) to raise and present that issue to the Supreme Court of Virginia. They failed to do so. As a result, the Petition should be denied.

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4. It is noteworthy that the other cases cited by Mr. and Mrs. Craig in support of this position also involve criminal convictions, not civil matters. Furthermore, the common thread throughout many of these decisions was that they involved racial discrimination in the "unforeseen" and "unexpected" application of the criminal statutes. Clearly, the due process analysis involved in criminal cases with racial overtones is significantly different than the analysis involved in this case.

2. In sustaining the Demurrer related to the alleged "partnership" among the Defendants, the Trial Court, as affirmed by the Supreme Court of Virginia, properly considered the express language of the Agreement between Mr. and Mrs. Craig and Southampton, attached to the Amended Motion for Judgment as Exhibit 1.

The rulings by the Trial Court, as affirmed by the Supreme Court of Virginia, were well grounded in Virginia law and were not "unforeseen and unexpected". As a result, there was no violation of Mr. and Mrs. Craig's due process rights. The principal argument advanced on Demurrer by Southampton, Westhampton, Basheer Communities and Edgemoore<sup>5</sup> was that Mr. and Mrs. Craig had failed to state a claim against all Defendants, other than Southampton, the only party obligated under the terms and conditions of the Agreement. In their Amended Motion for Judgment, Mr. and Mrs. Craig alleged that they had entered into a contract with a "partnership", comprised of all Defendants. Mr. and Mrs. Craig also argued that they had alleged a partnership by estoppel among the Defendants. Defendants argued that the express language of the Agreement, attached to the Amended Motion for Judgment and properly before the Trial Court for its consideration on demurrer, directly contradicted Mr. and

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5. In the litigation in the Trial Court, "Basheer & Edgemoore", the fictitious partnership, joined in the Demurrer and Plea in Bar filed by the other Defendants. "Basheer & Edgemoore" and the other Defendants expressly stated that by joining in the Demurrers and Pleas in Bar, they were in no way admitting the existence of such a partnership. However, "Basheer & Edgemoore" did not want to be placed in the position of being in default before the Trial Court. Defendants filed an affidavit pursuant to Virginia Code §8.01-279, denying the existence of this fictitious partnership.

Mrs. Craig's legal conclusions. As a result, Mr. and Mrs. Craig had failed to state a claim against Westhampton, Basheer Communities, Edgemoore and "Basheer & Edgemoore".

The legal standards by which a demurrer must be governed under Virginia law are straightforward. A demurrer admits the truth of all material facts properly pleaded. Under this rule, the facts admitted are those expressly alleged, those which fairly can be viewed as impliedly alleged, and those which may be fairly and justly inferred from the facts alleged. *CaterCorp, Inc. v. Catering, Inc.*, 246 Va. 22, 24, 431 S.E.2d 277 (1993). See *Dade v. Anderson*, 247 Va. 3, 5, 439 S.E.2d 353 (1994); *Palumbo v. Bennett*, 242 Va. 248, 249, 409 S.E.2d 152 (1991); *Rosillo v. Winters*, 235 Va. 268, 270, 367 S.E.2d 717 (1988); *Bowman v. State Bank of Keysville*, 229 Va. 534, 536, 331 S.E.2d 797 (1985); *Penick v. Dekker*, 228 Va. 161, 166, 319 S.E.2d 760 (1984). The Trial Court may examine not only the substantive allegations of the pleading but also any accompanying exhibit mentioned in the pleading. *Flippo v. F&L Land Co.*, 241 Va. 15, 17, 400 S.E.2d 156 (1991). A Trial Court considering a demurrer may ignore a party's factual allegations contradicted by the terms of authentic, unambiguous documents that properly are a part of the pleadings. *Ward's Equipment, Inc. v. New Holland NorthAmerica, Inc.*, 254 Va. 379, 383, 493 S.E.2d 516, 518 (1997); *Fun v. VMI*, 245 Va. 249, 253, 427 S.E.2d 181, 183 (1993). Unlike a motion for summary judgment, a demurrer does not allow the Trial Court to evaluate and decide the merits of a claim. It only tests the sufficiency of factual allegations to determine whether the complaint states a cause of action. *Fun*, 245 Va. at 252, 427 S.E.2d at 182. However, a demurrer does not admit the correctness of the pleaders conclusions of law. *Commercial Construction Specialties*,



*Inc. v. ACM Construction Management Corp.*, 242 Va. 102, 103, 405 S.E.2d 852 (1991); *Fox v. Custis*, 236 Va. 69, 71, 372 S.E.2d 373 (1988); *Ames v. American National Bank*, 163 Va. 1, 176 S.E. 204 (1934).

In this case, the Trial Court did not commit error by "considering matters outside the pleadings and by not considering the plaintiffs' Amended Motion for Judgment in the light most favorable to the plaintiffs" as Mr. and Mrs. Craig argued in their Petition for Appeal to the Supreme Court of Virginia. Rather, the Trial Court properly considered the express language of the Agreement, an exhibit to the Amended Motion for Judgment. The Agreement states in its first sentence that it is "by and between Basheer/Edgemoores-Southampton, L.L.C., trading as Basheer & Edgemoores (hereinafter referred to as "Seller"), and Stephen V. and Un Sun H. Craig (hereinafter referred to as "Purchaser") . . ." There is no reference to Westhampton, Basheer Communities, Edgemoores or a "Basheer & Edgemoores" partnership. In fact, "Basheer & Edgemoores" is plainly identified as a trade name for Southampton.

The Agreement demonstrated to the Trial Court that Westhampton, Basheer Communities, Edgemoores and "Basheer & Edgemoores" never had any contractual or legal relationship with Mr. and Mrs. Craig. Westhampton, Basheer Communities, Edgemoores and "Basheer & Edgemoores" were not direct parties to any of the contracts, closing documents, warranties and other related documents executed by the seller and the purchasers in connection with the Property. Southampton was the entity responsible for the development of the Southampton subdivision and the only proper party to any of the claims alleged in the Amended Motion for Judgment. Westhampton, Basheer Communities, Edgemoores



and "Basheer & Edgemoore" had nothing to do with the facts and circumstances allegedly giving rise to Plaintiffs' claims.

The *Agreement* set forth the duties and responsibilities of Mr. and Mrs. Craig and Southampton with respect to the warranty related to the Property. Yet, all Defendants were made parties to the breach of warranty claim in the Amended Motion for Judgment. The *Agreement* between Mr. and Mrs. Craig and Southampton established the "consumer transaction" which must be alleged in order to state a claim for violation of the Virginia Consumer Protection Act. Yet, all Defendants were made parties to the Consumer Protection Act claim in the Amended Motion for Judgment.<sup>6</sup>

Fortunately, the Trial Court properly relied on the Supreme Court of Virginia's holding in *Ward's Equipment*, considered the plain language of the *Agreement* and ignored the factual allegations that were contradicted by the terms of

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6. Plaintiffs alleged all of their claims against a non-existent partnership, "Basheer & Edgemoore", instead of making specific allegations against Southampton, Westhampton, Basheer Communities and Edgemoore. The reason for this creative style of pleading is obvious. Plaintiffs could not identify any specific acts and omissions of the other Defendants, with the exception of Southampton as the party to the *Agreement*, which would give rise to their theories of liability. So, they used "Basheer & Edgemoore", a fictitious trade name, and the presumptions on demurrer, in an attempt to hide these obvious defects. This approach was a transparent attempt to sue as many entities as possible, irrespective of their actual involvement in this transaction. In the meantime, Westhampton, Basheer Communities, Edgemoore and "Basheer & Edgemoore" were faced with the burden to defend each and every allegation in the Amended Motion for Judgment because Plaintiffs failed to specify which claims were attributable to which Defendants.

this authentic, unambiguous exhibit. In *Ward's Equipment*, the Supreme Court of Virginia held that:

[T]he court in ruling on the demurrer may properly consider the facts alleged as amplified by any written agreement added to the record on the motion. *Hechler Chevrolet, Inc. v. General Motors Corp.*, 230 Va. 396, 398, 337 S.E.2d 744, 746 (1985). Furthermore, and significant in this appeal, a court considering a demurer may ignore a party's factual allegations contradicted by the terms of authentic, unambiguous documents that properly are a part of the pleadings.

*See Fun v. Virginia Military Institute*, 245 Va. 249, 253, 427 S.E.2d 181, 183 (1993). *Ward's Equipment*, 254 Va. at 382-3, 493 S.E.2d at 518.

Specifically, in this case, the Trial Court observed that: "[T]he actual contract which is appended to [Plaintiffs'] pleading and was made part of it, does not indicate a partnership at all." December 9, 2004 Hearing Transcript ("Transcript"), 13. Furthermore, the Trial Court ruled that:

I think that the contract as argued by counsel is definitive. It states who the party is. It does not state it is a partnership. . . The contract was signed by the plaintiff. The plaintiff is deemed to know who the contracting party is and – by law, and as a matter of law relies on what the contract says about who the parties are.

So, there is no partnership by estoppel pled here, and I'll sustain the demurrer on that ground.

Transcript, 23.

Notwithstanding this appropriate analysis by the Trial Court, Mr. and Mrs. Craig argue that the Trial Court was obligated to accept their legal conclusion that the Defendants "operated as a partnership by estoppel." This argument is directly contrary to Virginia law. Under Virginia law, a demurrer does not admit the correctness of the pleaders conclusions of law. *Commercial Construction Specialties, Inc. v. ACM Construction Management Corp.*, 242 Va. 102, 103, 405 S.E.2d 852 (1991); *Fox v. Custis*, 236 Va. 69, 71, 372 S.E.2d 373 (1988); *Ames v. American National Bank*, 163 Va. 1, 176 S.E. 204 (1934). An allegation that Defendants operated as a partnership by estoppel is a mere legal conclusion which was properly disregarded by the Trial Court.

Mr. and Mrs. Craig also argued that Defendants should not have been heard to deny the existence of a partnership. However, once again, Mr. and Mrs. Craig misapplied Virginia law in this analysis. On demurrer, Defendants did not deny the existence of a partnership. Rather, they challenged whether Mr. and Mrs. Craig had made proper allegations regarding the alleged "partnership". Based upon the allegations contained in the Amended Motion for Judgment and the express language of the Agreement, the Trial Court properly disregarded Mr. and Mrs. Craig's mere legal conclusions and ignored those allegations which were directly contrary to the Agreement, in holding that there was no partnership or partnership by estoppel properly alleged in the Amended Motion for Judgment. For all of these reasons, the Trial Court and the Supreme Court of Virginia properly applied Virginia law in making the multiple rulings against Mr. and Mrs. Craig in this case. As a result, there clearly was no violation of Mr. and Mrs. Craig's due process rights under the Fourteenth Amendment.

3. In sustaining the Demurrer related to all fraud-related claims, the Trial Court, as affirmed by the Supreme Court of Virginia, properly relied on the valid and enforceable merger clause in the Agreement, on the economic loss rule and on Mr. and Mrs. Craig's improper allegations regarding misrepresentations related to future performance and statements of opinion.

In sustaining Southampton's Demurrer to Mr. and Mrs. Craig's claims for fraudulent inducement, actual fraud, constructive fraud and violation of the Virginia Consumer Protection Act, the Trial Court relied, in part, on the language of a merger clause contained in the Agreement. Specifically, paragraph 19 of the Agreement states that:

All understandings and agreements heretofore made between the parties are merged into this Agreement, which expresses the entire agreement between the parties hereto, and no representations, oral or written, not contained herein shall be considered a part of this Agreement. This Agreement may not be altered, enlarged, modified or changed except by an instrument in writing executed by all parties hereto. Purchaser acknowledges that no one has the authority to make and no one has made any statements or representations which have been relied upon by Buyer which modify or add to the terms and conditions set forth herein, including any statements relating to the existence, condition, use or development of nearby property, roads or open space, except as may be expressly set forth in an

exhibit or an endorsement hereto. The provisions hereof shall survive the delivery of the deed and shall not be merged therein.

Furthermore, paragraph 25(b) states that:

Purchaser hereby represents to Seller that Purchaser has not relied and is not relying on any warranties, promises, guarantees or representations made by Seller, any Agent of the Seller, or anyone else acting on behalf of Seller, with respect to the Purchase by Purchaser of the Property and the other matters set forth herein unless specifically reduced to writing and made a part of this Agreement.

Based in part upon this language, the Trial Court ruled that Mr. and Mrs. Craig had failed to state proper claims for fraudulent inducement, actual fraud, constructive fraud and violation of the Virginia Consumer Protection Act, in that their allegations of misrepresentations were expressly contradicted by the terms of the Agreement.

Mr. and Mrs. Craig argued in their Petition for Appeal to the Supreme Court of Virginia that fraud is not protected by a contractual merger clause. However, the authorities upon which they relied all related to merger by operation of law. In neither case was there a contractual merger clause involved, as there is in this matter. Furthermore, it was not solely the merger of obligations into the deed or into the Agreement that caused the Trial Court to disregard allegations of fraud, but rather the express representation made by Mr. and Mrs. Craig to Southampton in the Agreement that they were not relying upon any statements or promises, oral or written, outside of what was contained in the Agreement.



In reviewing a contract attached as an exhibit to an Amended Motion for Judgment, the Trial Court must rely upon well-established rules of construction under Virginia law.

It is the function of the court to construe the contract made by the parties, not to make a contract for them. The question for the court is what did the parties agree to as evidenced by their contract. The guiding light in the construction of a contract is the intention of the parties as expressed by them in the words they have used, and courts are bound to say that the parties intended what the written instrument plainly declares.

*W.F. Magann Corp. v. Virginia-Carolina Electrical Works, Inc.*, 203 Va. 259, 263, 123 S.E.2d 377, 381 (1962). See *Brooks v. Bankson*, 248 Va. 197, 204, 445 S.E.2d 473, 477 (1994); *Christopher Associates, L.P. v. Sessoms*, 245 Va. 18, 22, 425 S.E.2d 795, 797 (1993); *Ross v. Craw*, 231 Va. 206, 212, 343 S.E.2d 312, 316 (1986); *Wilson v. Holyfield*, 227 Va. 184, 187, 313 S.E.2d 396, 398 (1984). When contract terms are clear and unambiguous, a court must construe them according to their "plain meaning". *Foods First, Inc. v. Gables Associates*, 244 Va. 180, 182, 418 S.E.2d 888, 889 (1992); *Winn v. Aleda Construction Co.*, 227 Va. 304, 307, 315 S.E.2d 193, 194 (1984).

In this case, the language of paragraphs 19 and 25(b) could not be more clear and unambiguous. Mr. and Mrs. Craig acknowledged and agreed that "no representations, oral or written, not contained herein shall be considered a part of



this Agreement." Furthermore, Mr. and Mrs. Craig acknowledged and agreed that they had not relied

on any warranties, promises, guarantees or representations made by Seller, any Agent of the Seller, or anyone else acting on behalf of Seller, with respect to the Purchase by Purchaser of the Property and the other matters set forth herein unless specifically reduced to writing and made a part of this Agreement.

Considering this express language in one of the exhibits to the Amended Motion for Judgment, the Trial Court disregarded allegations of fraud, in that they were directly contrary to the representations made by Mr. and Mrs. Craig to Southampton in the Agreement. For these reasons, the Trial Court properly sustained Southampton's Demurrer with respect to the claims for fraudulent inducement, actual fraud, constructive fraud and violation of the Virginia Consumer Protection Act.

However, even if this ruling were misplaced under Virginia law, the Trial Court properly relied on the economic loss doctrine and the defects in Mr. and Mrs. Craig's allegations regarding the alleged misrepresentations upon which they based their claims. With respect to economic loss, under Virginia law, a party may only show both a breach of contract and a tortious breach of duty when the duty tortiously or negligently breached arises from a common law duty and not one existing between the parties solely by virtue of the contract. *Richmond Metropolitan Authority v. McDevitt Street Bovis, Inc.*, 256 Va. 553, 558, 507 S.E.2d 344, 347 (1998); *Foreign Mission Board v. Wade*, 242 Va. 234, 241, 409 S.E.2d 144, 148 (1991); *Spence v. Norfolk & W. R.R. Co.*, 92 Va.

102, 116, 22 S.E. 815, 818 (1895). This rule prevents every breach of contract action from turning into an action for fraud or negligence.

Recently, this rule was further clarified in the case of *Filak v. George*, 267 Va. 612, 594 S.E.2d 610 (2004). In *Filak*, plaintiffs appealed the Trial Court's sustaining of a demurrer to a claim for constructive fraud, based upon the economic loss rule. Plaintiffs alleged that the defendant insurance agent had made a series of representations to them regarding the terms and conditions of the insurance policy she would obtain for them. This Court affirmed, agreeing with the Trial Court that fraud is not actionable when such a claim essentially alleges negligent performance of contractual duties. Specifically, this Court stated that:

— Losses suffered as a result of the breach of a duty assumed only by agreement, rather than a duty imposed by law, remain the sole province of the law of contracts. The rationale for this rule lies in the distinctly different policy considerations distinguishing the law of torts from the law of contracts.

The primary consideration underlying tort law is the protection of persons and property from injury, while the major consideration underlying contract law is the protection of bargained for expectations. Thus, when a plaintiff alleges and proves nothing more than disappointed economic expectations, the law of contracts, not the law of torts, provides the remedy for such economic losses.

*Filak*, 267 Va. at 618, 594 S.E.2d at 613.

In support of their claims for fraudulent inducement, actual fraud and constructive fraud, Mr. and Mrs. Craig only alleged improper performance of contractual duties. Specifically, Mr. and Mrs. Craig alleged improper characteristics, standards, grade, style and quality of construction, improper placing of utility lines, improper grading of their lot, failure to honor their desired termination of the Agreement and failure to honor their rights under the Warranty. All of these alleged "misrepresentations" actually reflect disappointed economic expectations that arise out of the Agreement. Under Virginia law, these claims clearly arise out of contract and not in tort. The Trial Court properly relied on this rule, in part, in sustaining Defendants' demurrers.

Furthermore, under Virginia law, a cause of action for fraud must be pleaded with particularity. *Tuscarora, Inc. v. B.V.A. Credit Corporation, et al.*, 218 Va. 849, 858-9, 241 S.E.2d 778, 783 (1978); *Welfley v. Shenandoah Iron, et al.*, 83 Va. 768, 3 S.E. 376, 378 (1887); *Gregory v. Peoples*, 80 Va. 355 (1885). In order to state a claim for fraud, a plaintiff must allege: (1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to the party misled. *Meridian Title Insurance Co. v. Lilly Homes, Inc. et al.*, 735 F. Supp. 182, 185 (E.D. Va. 1990); *Winn v. Aleda Construction Co.*, 227 Va. 304, 305, 315 S.E.2d 193, 195 (1984). In a claim for constructive fraud, the false representation of a material fact is made innocently or negligently in such a way as to induce a reasonable person to believe it. *Blair Construction, Inc. v. Weatherford*, 253 Va. 343, 346, 485 S.E.2d 137, 139 (1997); *Mortarino v. Consultant Engineering Services, Inc.*, 251 Va. 289, 295, 467 S.E.2d 778, 782 (1996); *Nationwide Mut. Ins. Co. v. Hargraves*, 242 Va. 88, 92, 405 S.E.2d 848, 851 (1991).

The misrepresentations upon which a plaintiff relies must be representations of present, pre-existing fact. See *McMillion v. Dryvit Systems, Inc.*, 262 Va. 463, 471, 553 S.E.2d 364, 369 (2001); *Mortarino v. Consultant Engineering Services, Inc.*, 251 Va. 289, 293, 467 S.E.2d 778, 781 (1996). Furthermore, the facts out of which the fraud arises, including the identity of the person or persons making the misrepresentations, and the date and time that they were made, must be alleged as well as proven. *Tuscarora, Inc. v. B.V.A. Credit Corporation, et al.*, 218 Va. 849, 858, 241 S.E.2d 778, 783 (1978). These standards apply not only to causes of action for fraud and constructive fraud, but also to claims arising under the Virginia Consumer Protection Act. *Lambert v. Downtown Garage, Inc.*, 262 Va. 707, 714, 553 S.E.2d 714, 718 (2001).

In this case, the Amended Motion for Judgment was replete with defects under these standards. Initially, Plaintiffs did not properly apprise each Defendant of the claims against it. Because Mr. and Mrs. Craig made their allegations against all Defendants collectively under their "partnership" theory, it was impossible to decipher whether any specific Defendant had liability on these fraud claims. The Trial Court properly recognized that the Amended Motion for Judgment failed to apprise the Defendants of the claims against them.

Additionally, Mr. and Mrs. Craig failed to plead misrepresentations of present, pre-existing facts under the fraud-based counts. In *Patrick v. Summers*, 235 Va. 452, 454, 269 S.E.2d 162, 164 (1988) (quoting *Soble v. Herman*, 175 Va. 489, 500, 9 S.E.2d 459, 464 (1940)), this Court stated that: "[F]raud must relate to a present or a pre-existing fact, and cannot ordinarily be predicated on unfulfilled promises or statements as to future events." See also *McMillion v.*

*Dryvit Systems, Inc.*, 262 Va. 463, 471, 553 S.E.2d 364, 369 (2001); *Mortarino v. Consultant Engineering Services, Inc.*, 251 Va. 289, 293, 467 S.E.2d 778, 781 (1996). In setting forth their fraud-based claims, Mr. and Mrs. Craig relied upon representations that: (1) all other lots *would* have a higher premium than the lot purchased by the Plaintiffs, (2) that their lot *would* be flat with privacy, (3) that all utility lines *would* be buried underground, (4) that the home *would* be finished without material and design defects, and scores of other representations concerning other future promises or statements as to future events. These allegations did not form the basis for a claim of fraud or violation of the Virginia Consumer Protection Act. They were mere statements of future performance or opinion, and not pre-existing fact. As a result, the Trial Court properly sustained Southampton's Demurrer on these additional bases.

Try as they might, Mr. and Mrs. Craig have been unable to escape the clear and unambiguous language of their Agreement with Southampton. They were provided every opportunity to litigate their breach of warranty claims against Southampton, the party with whom they entered into the Agreement, yet they dismissed those claims *voluntarily*, with prejudice. Now, having dismissed their principal claim voluntarily, they come before the Supreme Court of the United States and argue that the Virginia courts have denied them their due process rights. Such a position is illogical and contrary to law, based on the long history of this case. The Trial Court and the Supreme Court of Virginia provided Mr. and Mrs. Craig with multiple opportunities to litigate their claims. The courts' rulings were well-grounded in Virginia law. For all of these reasons, the Petition for Writ of Certiorari filed by Mr. and Mrs. Craig should be denied.



## CONCLUSION

For all of the foregoing reasons, Respondents, Basheer/Edgemoore-Southampton, L.L.C., Basheer/Edgemoore-Westhampton, L.L.C., Edgemoore Homes, L.L.C., and "Basheer & Edgemoore" respectfully pray that the Petition for Writ of Certiorari filed by Petitioners, Stephen Craig and Un Sun Craig, in this cause should be denied and that the rulings of the Supreme Court of Virginia and the Trial Court should be affirmed in all respects.

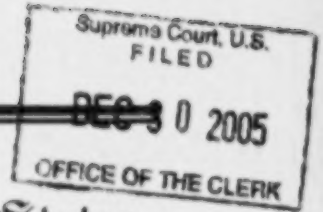
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No. 05-693



IN THE

**Supreme Court of the United States**

STEPHEN V. CRAIG AND UN SUN H. CRAIG, PETITIONERS

v.

DIANE COX BASHEER COMMUNITIES, INC.; EDGEMOORE  
HOMES, LLC; BASHEER/EDGEMOORE SOUTHAMPTON,  
LLC; BASHEER/EDGEMOORE-WESTHAMPTON, LLC;  
AND BASHEER & EDGEMOORE, A VIRGINIA GENERAL  
PARTNERSHIP,

*PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF VIRGINIA*

**PETITION FOR WRIT OF CERTIORARI**

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**BRIEF IN OPPOSITION TO PETITION FOR  
CERTIORARI**

COMES NOW, the Respondent, Diane Cox Basheer Communities, Inc., by counsel, and for its Brief in Opposition to Petition for Writ of *Certiorari*, respectfully submits the following:

**COUNTER STATEMENT**

This matter arises out of an agreement to purchase real property improved with a new dwelling. The Petitioners, Stephen Craig and Un Sun Craig, allege that they entered into an agreement to purchase improved real property on May 20, 2000. The contract, which was attached by the Petitioners to the Motion for Judgment<sup>1</sup> and the Amended Motion for Judgment, and incorporated into the Motion for Judgment,<sup>2</sup> states that the contract is "by and between Basheer Edgemore-Southampton, LLC, t/a Basheer & Edgemore (hereinafter referred to as "Seller"), and Stephen V. and Unsun H. Craig (hereinafter referred to as "Purchaser")..."

Diane Cox Basheer Communities, Inc. demurred as to all Counts.<sup>3</sup> Diane Cox Basheer Communities, Inc. is alleged to have been a partner by estoppel in a

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<sup>1</sup>In Virginia, the initial pleading in an action at law is titled "Motion for Judgment". Va. Sup. Ct. Rule 3:3. Effective January 1, 2006, the initial pleading will be called a "Complaint". Va. Sup. Ct. Rule 3:2.

<sup>2</sup>See Va. Sup. Ct. Rule 1:4 (i).

<sup>3</sup>The current action was a refiling of a prior non-suited action. In the prior action, the defendants had filed Demurrers which had been sustained. (Tr. p. 49) See record in *Craig v. Basheer & Edgemore*, Law No. 208859, Circuit Court of Fairfax County)

partnership with the same trade name as the seller: Basheer & Edgemoore. After extensive briefing and argument, the Court sustained the Demurrers by Order dated June 16, 2004, and granted the Petitioners thirty days to amend. An Amended Motion for Judgment was subsequently filed.

Diane Cox Basheer Communities, Inc. filed a Plea in Bar based on Petitioners/Appellants' failure to timely serve Defendants/Appellees with the Amended Motion for Judgment, as well as a Demurrer to the Amended Motion for Judgment. Once again, extensive briefs were filed concerning the Demurrer to the Amended Motion for Judgment, and oral argument was held before the Honorable Marcus D. Williams on December 9, 2004. The Plea in Bar was overruled. The Court sustained the Demurrers as to Diane Cox Basheer Communities, Inc., and dismissed all claims against Diane Cox Basheer Communities, Inc. The Court further sustained the Demurrers as to all other defendants concerning all claims, with the exception of the claims for breach of contract and breach of warranty against the seller identified in the written contract.

No Federal claims were raised in the initial pleadings. Count I of the Amended Motion for Judgment sought to recover against all defendants for a breach of contract and breach of warranty. In Count I, the Petitioners alleged that Diane Cox Basheer Communities, Inc., Edgemoore Homes, LLC, Basheer/Edgemoore Southampton, LLC, Basheer/Edgemoore Westhampton, LLC and "possibly other entities" all held themselves out to be general partners in a Virginia partnership trading as the name of "Basheer/Edgemoore". See Amended Motion for Judgment, ¶ 7. In oral argument, counsel for the Petitioners made it clear that the basis for the allegations



against Diane Cox Basheer Communities, Inc. was the creation of a partnership by estoppel. "That's our whole theory of this case, that this is a partnership by estoppel, and that we have got substantial - ". (Tr. p. 14).<sup>4</sup>

There were no allegations of any separate act or omission on the part of Diane Cox Basheer Communities, Inc., and no allegations that Diane Cox Basheer Communities, Inc.'s employees or representatives made any of the statements which form the basis for the fraud allegations. Diane Cox Basheer Communities' alleged liability was only by reason of the partnership by estoppel.

With respect to Count I, the Court sustained the Demurrer, finding that the effort to impose liability on Diane Cox Basheer Communities, Inc. for the contract to sell real property which it had not signed did not state a claim:

"I think that the contract as argued by counsel is definitive. It states who the party is. It does not state it as a partnership, and if there were prior representations that it was a partnership, and paragraph 19 addresses those prior representations, and they are not part of the contract.

The contract was signed by the plaintiff. The plaintiff is deemed to know who the contract and party is and - by law and as a matter of law relies on what the contract says about who the parties are. So there is no partnership by estoppel pled here and I will sustain the

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<sup>4</sup>"Tr." refers to Transcript of the Hearing before the Circuit Court for Fairfax County on December 9, 2004.

Demurrer on that ground." (Tr. p. 23).

Count II sought to recover damages under the Virginia Consumer Protection Act. The Court sustained the Demurrer to Count II on the basis that Diane Cox Basheer Communities, Inc. was not a party to the consumer transaction and, therefore, could not be liable for a violation of the Virginia Consumer Protection Act. The Court further sustained the Demurrer on the basis that there was a lack of specificity of the allegations pled under the Virginia Consumer Protection Act. The Court found a number of conclusory statements, but not the kind of specificity the Court expects to see when making the type of allegation in question. (Tr. p. 48). The Court further found that much of what was pled dealt with future events and broken promises, but not misrepresentations of fact. (Tr. p. 48). The Petitioners/Appellants have not appealed the dismissal of Count II.

Count III sought to recover for fraud in the inducement. The specific allegations that were the subject of the fraud were: that the yard surrounding the house would be flat (Amended Motion for Judgment, ¶ 79), that the house would be of the same quality as the model house (Amended Motion for Judgment, ¶ 80), that there were misrepresentations as to the characteristics, standards, quality and style of the house that would be built (Amended Motion for Judgment, ¶ 84), that the Petitioners would have certain rights under a warranty (Amended Motion for Judgment, ¶ 85), that after a contract was entered into, that the Petitioners did not have the right to repudiate the contract (Amended Motion for Judgment, ¶ 86), that the yard would be flat and there would be privacy (Amended Motion for Judgment, ¶ 87), that the utilities in the area would be underground (Amended Motion for Judgment, ¶ 88), that

other lots had a higher lot premium (Amended Motion for Judgment, ¶ 89), that the Seller was licensed to transact business (Amended Motion for Judgment, ¶ 90), and that a radon mitigation system was not installed in the house (Amended Motion for Judgment, ¶ 91). As to these allegations, the Defendants/Respondents demurred on the basis that they made references to future conduct, that they were references to opinions, of qualities and standards, as opposed to statements of facts, that the allegations were specifically controlled by the terms of the contract and that the misrepresentations were nothing more than the breach of the contractual obligations. The Defendants/Respondents argued that statements made after the contract was signed could not have induced the contract. The Court sustained the Demurrers to Count III, stating:

"To summarize, in Count III, the allegations deal with future performance. Some are not very specific about misrepresentations, and even if they are specific, the merger clause would seem to address this and would indicate that there could not have been reliance upon misrepresentations because in the contract, you have a merger clause where the plaintiff acknowledges that it did not rely upon other representations outside the contract. I will sustain the Demurrer."

(Tr. p. 65).

The Petitioners did not appeal to the Trial Court the rulings dealing with the future performance, nor have the Petitioners appealed the ruling on the lack of specificity of the fraud allegations. Before the Virginia Supreme Court the Petitioners only appealed the trial Court's application of the merger clause. Count IV

sought to recover for actual fraud based on representations that there was a promise to install a radon mitigation system in the house and that system was not installed. (Amended Motion for Judgment ¶ 97). Count V sought to recover for constructive fraud for the same alleged failure to install a radon mitigation system. (Amended Motion for Judgment ¶ 107). The Defendants demurred for the same reasons as for Count III, and that fraud could not be predicated on failure to perform the contract. The Court found that the prior rulings also applied to Counts IV and V. (Tr. p. 73). The Petitioners did not appeal this ruling.

Finally, Count VI was titled "Vicarious Liability". The Court did not view Count VI as being an additional substantive cause of action. The Court found it was merely an expression of a theory of liability against all of the parties, but the Court had already ruled on that elsewhere and found it to be moot. (Tr. p. 73). The Petitioners have not appealed this ruling.

After the Court had sustained the Demurrers, the only issue left in the case was the breach of contract/breach of express warranties for breach of contract and breach of warranty. After the sustaining of the Demurrers, the Petitioners voluntarily dismissed the contract claims with prejudice.

## **REASONS FOR DENYING THE PETITION**

### **A. Summary of Argument**

No question or issue involving a violation of Federal law was raised at either the Trial Court or before the Virginia Supreme Court. To support the allegation of jurisdiction, under 28 U.S.C. § 1257 (a), the Petitioners have not identified the violation of any Federal law by

these Courts, but rather, assert that there has been an abdication of Virginia law on creation of partnership by estoppel, which deprives the Petitioners of their due process rights. As will be shown below, there was no change in Virginia law. Under Virginia law, partnership by estoppel requires allegations and proof of entering into an agreement based on relying on the existence of a partnership, and this theory of liability can only apply to the contract claims. There cannot be, as a matter of law, a reliance on the existence of a partnership in connection with tort allegations. As the Petitioners have dismissed with prejudice the claims for breach of contract against the Seller, no purpose would be served in allowing a case to proceed against Diane Cox Basheer Communities, Inc. for vicarious liability under a partnership by estoppel for a contract and warranty claim that has already been dismissed. The Court correctly ruled that Diane Cox Basheer Communities was not a party to the contract.

The Petitioners' sole argument is that the Court should have recognized a partnership by estoppel. Even if the Court were to recognize partnership by estoppel, which might create vicarious liability for Diane Cox Basheer Communities, Inc., there is no underlying claim still extant which could impose liability on Diane Communities, Inc. The Petitioners have chosen not to appeal the Court's ruling regarding the other theories of liability. Even if successful in having the Court extend partnership by estoppel to tort cases, by not challenging the other grounds of the Court rulings, the Petitioners are barred from recovering.



**B. No Federal Question Is Presented By the Virginia Courts' Valid Determination of State Law Issues**

The United States Supreme Court's power to review decisions by the Virginia Supreme Court are limited to those cases involving questions of Federal law, or violation of the United States Constitution.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257 (a). In an effort to obtain jurisdiction, the Petitioners allege a violation of due process of the law and argue that the alleged abdication of the state rules concerning imposing liability for a partnership by estoppel was unforeseen, unexpected, and an abdication of the law. Under the Petitioners' argument, it assumes that there was a failure to follow state law. Further, under their argument, every time a state changed its laws, litigants would have an alleged due process violation. In support of their argument, the petitions rely on *Bowie v. City of Columbia*, 378 U.S. 347 (1964). This case did not concern a change in interpretation of a law in



a civil case, but rather, the South Carolina Supreme Court's retroactive construction of a criminal statute which violated the constitutional requirement of definiteness, and the underlying principle that a person of ordinary intelligence should be given fair notice that the contemplated conduct was forbidden by statute made it criminal to enter onto property after being given fair notice prohibiting the entry. The Supreme Court interpreted a trespass statute to apply to both entry onto land and remaining on the property. It was this reinterpretation which violated a criminal due process right, and was the subject of the Supreme Court's decision. In the case at bar, there is no allegation of a change in the interpretation of a criminal statute which would deprive the Petitioners of their due process rights.

The Petitioners also cite *Adams v. Robertson*, 520 U.S. 83 (1997) for the proposition that this Court could consider an appeal from a state court decision when there was a failure to raise a Federal question before the Alabama Supreme Court. In *Adams* the Court held that since the Petitioners failed to establish that they properly presented the alleged violation of the Fourteenth Amendment due process clause to the Alabama Supreme Court, the United States Supreme Court would not reach the issue presented, and dismissed the Writ of *Certiorari* as improvidently granted. When the state's highest court is silent on a Federal question, it is assumed that the issue was not properly presented. *Id.* at 86. The only exception is when the aggrieved party establishes that the state court had a "fair opportunity to address the Federal question that is sought to be presented" to the United States Supreme Court. *Webb v. Webb*, 451 U.S. 493, 501 (1981). The Virginia Supreme Court was silent on any Federal question. The Petitioners have not attempted to overcome the presumption that the Federal

question was not presented to the Virginia Supreme Court.

None of the cases cited by the Petitioners support a finding of jurisdiction merely because of a varied interpretation of a rule of law by a state's highest court. For example, in *Bush v. Gore*, 531 U.S. 98, 115 (2000), (Renquist, CJ concurring) the opinion did not consider whether or not the United States Supreme Court had jurisdiction under 28 U.S.C. § 1257. In *Wright v. Georgia*, 373 U.S. 284, 289-291 (1963), the alleged violation of the Fourteenth Amendment was presented at the trial court and before the Georgia Supreme Court. In *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 457-458 (1958), the Federal questions had been raised to the Supreme Court of Alabama. In *United States v. Lanier*, 520, U.S. 259, 266 (1997), the question was presented as to whether there was a violation of 18 U.S.C. § 242 for criminally violating the constitutional rights of five women by assaulting them sexually while the respondent served as a state judge. The question before the Court was whether or not there was fair warning or notice of what the law intended.

No issue was raised as to the Court's jurisdiction to decide Federal questions. Finally, in *Marks v. United States*, 430 U.S. 188, 191-192 (1977), there was an appeal of a conviction of the transporting obscene materials in violation of Federal law, and a question of the retroactive application of a new standard for defining pornography. Again, there was no question raised as to whether or not the Court had jurisdiction under 28 U.S.C. § 1257.

**C. The Doctrine Of Partnership By Estoppel Or Implied Partnership Is Not Applicable To Tort Actions.**

The Petitioners argue that the trial Court and the

Virginia Supreme Court should have considered the existence of a partnership by estoppel in the Petitioners' effort to hold additional entities liable on the contract claims and other claims. In Virginia, the existence of a partnership by estoppel is controlled by Va. Code § 50-73.98:

- "A. If a person, by words or conduct, purports to be a partner, or consents to being represented by another as a partner, in a partnership or with one or more persons not partners, the purported partner is liable to a person to whom the representation is made, if that person, relying on the representation, enters into a transaction with the actual or purported partnership. If the representation, either by the purported partner or by a person with the purported person's consent, is made in a public manner, the purported partner is liable to a person who relies upon the purported partnership even if the purported partner is not aware of being held out as a partner to the claimant. If partnership liability results, the purported partner is liable with respect to that liability as if the purported partner were a partner. If no partnership liability results, the purported partner is liable with respect to that liability jointly and severally with any other person consenting to the representation." (emphasis added.)

The statute is an adaptation of the common law, which also provided that parties are estopped from denying a partnership where they hold themselves out as partners

and a third party reasonably relies on the representations to its detriment. "In order for the third person to be liable as a partner on the ground of estoppel, two things must be proven: (1) the act of holding out must have been done either by him or with his consent; and (2) such holding out must have been known to the party seeking to avail himself of it and credit given on the faith of it." *Hobbs v. Bank*, 147 Va. 802, 841, 128 S.E. 2d 46 (1926); *Cooper v. Knox*, 197 Va. 602, 607, 90 S.E. 2d 844 (1956). The concept of partnership by estoppel requires an element of reliance, and there can be no reliance in the existence of a partnership for tort based allegations.

"The only theory under which a person who is not a partner in a partnership with other persons can be held liable as a partner with others to a third person is on the basis of estoppel, although this principle of law can only be relied upon by third parties, by his own conduct, the person who is not a partner represents himself or allows himself to be represented to a third person as being a partner, and the third party relying on such representation of conduct gives credit to the supposed partnership... This doctrine of estoppel in such cases is not applicable to purely tort actions, because the third party in such cases is not injured as a result of any conduct on the part of the person he is attempting to hold as a partner in connection with a negligent act on the part of another person or persons. It can only be used in connection with a contract or where credit is given in reliance on such conduct..."  
[citations omitted.]

*Pruitt v. Fetty*, 148 W. Va. 275, 279-280, 134 S.E. 2d 713,

716-171 (1964).

Even if the Court were to find a partnership by estoppel, Diane Cox Basheer Communities, Inc. would only be liable for the breach of contract and warranty claims, which have now been dismissed with prejudice. The Petitioners cannot recover against the alleged partnership, when the Court has entered a final judgment against the alleged agent for the partnership. *See Santen v. Tuthill*, 265 Va. 492, 578 S.E. 2d 788 (2003); *Roughton Pontiac Corp. v. Alston*, 236 Va. 372 S.E. 2d 147 (1988).

The only "partnership" that was alleged did not include the named seller on the contract. When asked by the trial court the allegations a partnership existed, Petitioners' counsel pointed to Exhibit B to the Amended Motion for Judgment. (Tr. p. 15). The seller is not one of the entities identified in the exhibit as a "partner". Even if a partnership existed, the "partnership" was not part of the sale.

**D. The Petitioners Fail To State Any Cause Of Action Against Defendant Diane Cox Basheer Communities, Inc.**

A Demurrer will be sustained by the Court if a plaintiff fails to sufficiently plead a cause of action against a defendant, when all properly pled facts are taken as true. *Ward's Equipment, Inc., et.al. v. New Holland North America, Inc.*, 254 Va. 379, 382, 493 S.E. 2d 516, 518 (1997). In considering a demurrer, a court will draw all inferences from the facts alleged in favor of the non-moving party, but "a demurrer does not admit the correctness of the pleader's conclusions of law." *Id.* Petitioners must allege facts sufficient to state a case of action. Va. Code § 8.01-273. The record makes it clear that the Court only looked at the allegations in the



Amended Motion for Judgment, and the exhibits thereto.

Despite the fact that the agreement entered into by the Petitioners states on its face that it is with Basheer/Edgemoore-Southampton, L.L.C., the Petitioners attempt to impose liability against Diane Cox Basheer Communities, Inc. by arguing that the two entities are members of a general partnership doing business under the trade name "Basheer & Edgemoore." Although Diane Cox Basheer Communities, Inc. is not mentioned or identified anywhere in the agreement signed by the Petitioners, the Petitioners allege that the partnership exists because the entities allegedly hold themselves out to be a general partnership "in advertising, marketing, construction, sharing of employees, sharing of contractor licenses, and prolific use of the trade name 'Basheer & Edgemoore'." (Amended Motion for Judgment, ¶ 7). Petitioners' specific allegations related to documents reviewed **after** the contract was signed.<sup>5</sup> The Petitioners cannot now claim reliance on the existence of a partnership they learned about after the contract was signed.

The contract was for the sale of the property, was fully endorsed by the Petitioners, and explicitly states in the first paragraph that the contracting party is "Basheer, Edgemoore- Southampton, L.L.C." A limited liability company in Virginia is an identifiable entity, and its liabilities and composition are determined by statute. The Petitioners attempt now to impose liability against a "partnership" in the face of clear and unambiguous language to the contrary in the contract. Factual allegations in pleadings must be disregarded if they "are

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<sup>5</sup>Compare the contract dated May 20, 2000, with the letter allegedly showing a partnership dated four days later on May 24, 2000.



refuted by the terms of the authentic, unambiguous documents that are a part of the pleadings." *Ward's Equipment, Inc. et al. v. New Holland North American, Inc.*, 254 Va. 379, 384, 493 S.E.2d 516, 519 (1997). The sales contract was attached to the motion for judgment as Exhibit 1, and any allegations made by the plaintiff that a partnership, or any entity other than Basheer/Edgemoore-Southampton, L.L.C., was liable on the contract were refuted by the contract, and should not be considered. Any documentation or statements made after the contract was entered into by the Petitioners are irrelevant. The Petitioners were aware at the time of contracting that they were purchasing a home from one entity only; that is, Basheer/Edgemoore-Southampton, L.L.C.. The Petitioners may not now attempt to change the clear wording of the contract to impose liability on uninvolved entities.

There can be no reliance, as a matter of law, on alleged misrepresentations concerning the identity of a party to the contract, when the contract expressly identifies the parties. In *Board of Directors of Carrdinal Place Condominium v. R. Carr Homes Partnership, et.al.*, 58 Va. Cir. 602 (2000), Judge Alden of the Fairfax Circuit Court held that as a matter of law, in granting a Motion for Summary Judgment, the plaintiff did not allege misrepresentations as to the identity of the seller, when the seller was identified in the contract. There could be no reliance on any misrepresentations or statements prior. Likewise, there could be no reliance by the Petitioners here that they entered into a contract with a non-existent partnership not identified in the contract.

The Virginia Supreme Court has held that the term "partnership" itself is not sufficient to establish a legal partnership or to impose the liabilities of a partner

on a second party. In *Kennedy v. Mullins*, 155 Va. 166, 154 S.E. 568 (1930), the Supreme Court of Virginia stated that "if the terms of the contract existing between the parties do not constitute a partnership, none will be declared, even though the parties in words call the arrangement one." *Id.* at 173, 570. Under this precedent, the fact that correspondence provided to the Petitioners states in general terms that "Basheer & Edgemoore" is a partnership with Diane Cox Basheer Communities, Inc. and Edgemoore Homes is insufficient to impose liability against Diane Cox Basheer Communities, Inc.

The Petitioners have not alleged that Diane Cox Basheer Communities, Inc. nor any other entity have joined together "their money, goods, labor, or skill in a venture or business, upon an agreement to divide the gains or losses between them." *Cooper v. Knox*, 197 Va. 602, 607, 90 S.E. 2d 844, 847 (1956). The Court is not required to accept general legal conclusions pled by a plaintiff in a motion for judgment. As such, the Petitioners have not established sufficient factual allegations to support a finding of a general partnership between Diane Cox Basheer Communities, Inc. and the entity that entered into the contract with the Petitioners for the sale of their home. As there are no direct allegations against Diane Cox Basheer Communities, Inc. for any acts taken by that entity, and the Petitioners have not established sufficient factual support to allege liability based on a partnership, all counts against Diane Cox Basheer Communities, Inc. were properly dismissed.

**E. The Petitioners have not Appealed the Court's Rulings on Fraud that are not Based on the Merger Clause**

Before the Virginia Supreme Court, the Petitioners focused their argument on the trial Court's ruling on the merger clause. They have ignored the Court's ruling on the other bases for why the claims for fraud were dismissed, and have not challenged those rulings before the Court.

In Counts III through V, the Petitioners claim actions based on fraudulent inducement, actual fraud and constructive fraud. In these allegations Diane Cox Basheer Communities, Inc. is not specifically named.

Counts IV and V are based solely on the allegations that there was a failure to install a radon mitigation system as required under the contract. The allegations in Counts IV and V arise solely from the breach of contract and cannot support an action in tort. *Richmond Metropolitan Authority v. McDevitt Street Bovis, Inc.*, 256 Va. 553, 558, 507 S.E. 2d 344, 347 (1998).

Here, the trial court correctly found that many of the alleged allegations of fraud did not involve present statements of fact, but rather involved future transactions. For example, the Petitioners sued for failure to build the house of the same quality as the model, (Amended Motion for Judgment, ¶ 81), and because the yard would not be flat. Both reference future activities. The Petitioners then allege that there were misrepresentations concerning character, style, quality and grades. The Court correctly held that these statements as to quality were not actionable. *See Tate v. Colony House Builders, Inc.*, 257 Va. 78, 508 S.E. 2d 597 (1999). (statements that a new dwelling house was competently designed, commensurate with the price, and

that the design of the construction was of the highest quality were puffery and opinion and could not form the basis for an action for constructive fraud). Similarly, the Court's findings that representations of the parties' rights and legal obligations, such as whether or not the contract could be repudiated, or the parties' rights under a warranty, are statements of law, and cannot form the basis for a claim for fraud. See *Giovanni Mortarino v. Consulting Engineering Services*, 251 Va. 289, 467 S.E. 2d 778 (1996) (fraud cannot be predicated on statements of opinion, and must relate to pre-existing facts, and not unfulfilled promises or statements as to future events.)

In addition to their allegations concerning future contractual obligations, the Court found that the merger clause would apply to these allegations of fraud, and as a result of the application of the merger clause, no liability could be imposed. The Petitioners have not cited any binding authority that the merger clause should not apply to the facts of this case. Even without the merger clause, there could be no claim. Breaches of future promises, or contractual based obligations do not state claims. *Metropolitan Authority v. McDevitt Street Bovis*, 256 Va. 553, 507 S.E. 2d 344 (1998).

Petitioners have not challenged the Court's rulings concerning Counts IV (Actual Fraud) and V (Constructive Fraud). These Counts concern the alleged misrepresentations that a radon remediation system was installed. The duty to install such a system arose out of the duties created by the contract. Where the misrepresentation concerns a duty created by contract, the remedy is a claim for breach of contract, not fraud. "A tort action cannot be based solely on negligent breach of contract." *Richmond Metropolitan Authority v. McDevitt Street Bovis*, 256 Va. 553, 559 307 S.E. 2d 344 (1998).

The decision by the Trial Court was well grounded,

based on Virginia law and precedence. The decision by the Virginia Supreme Court refusing to grant the Petition for Appeal was also well supported by Virginia law. Even if the Petitioners are correct, and the Virginia Supreme Court changed its rule concerning the creation of a partnership by estoppel, that finding does not allow the Petitioners to proceed. The underlying torts, upon which vicarious liability is sought to be imposed have not been challenged on appeal. Simply finding a partnership would provide no relief, since there is no valid claim against any of the partners at this time. Those claims have all been dismissed.

### CONCLUSION

For the above reasons, the Petition for Writ of *Certiorari* should be denied.

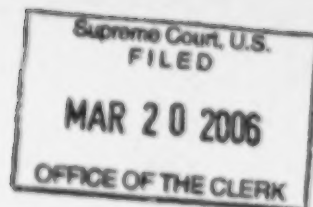
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No. 05-698

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IN THE  
**Supreme Court of the United States**

STEPHEN V. CRAIG AND UN SUN H. CRAIG, PETITIONERS

v.

DIANE COX BASHEER COMMUNITIES, INC.; EDGEMOORE  
HOMES, LLC; BASHEER/EDGEMOORE-SOUTHAMPTON,  
LLC; BASHEER/EDGEMOORE-WESTHAMPTON, LLC;  
AND BASHEER & EDGEMOORE, A VIRGINIA GENERAL  
PARTNERSHIP,

---

*PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF VIRGINIA*

---

**PETITION FOR REHEARING**

---

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**QUESTION PRESENTED**

Did the Virginia state courts deny the petitioners due process of law when they unexpectedly and without fair warning repudiated the petitioners' claims that the respondents, acting in concert, committed fraud and violated the Virginia Consumer Protection Act in the marketing, selling and building of the petitioners' home?

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## OPINIONS BELOW

The relevant Opinions and Orders are contained in the petitioners' original petition for certiorari, the denial of which is the subject of this Petition for Rehearing.

## JURISDICTION

The Court denied the petitioners' original petition for certiorari on February 21, 2006. This petition for rehearing is filed within 25 days of this Court's denial of the petition for certiorari consistent with the provisions of Supreme Court Rule 44.2.

## RELEVANT PROVISIONS INVOLVED

### **United States Constitution, Amendment XIV, Section 1:**

...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law....

### **Virginia Code Section 59.1-198:**

....  
 "Consumer transaction" means:

1. The advertisement, sale, lease, license or offering for sale, lease or license, of goods or services to be used primarily for personal, family or household purposes;

....  
 "Goods" means all real, personal or mixed property, tangible or intangible....

### **Virginia Code Section 59.1-200:**

**Prohibited Practices.**-----A. The following

fraudulent acts or practices committed by a supplier in connection with a consumer transaction are hereby declared unlawful:

1. Misrepresenting goods or services as those of another;

.....

2. Misrepresenting the source, sponsorship, approval, or certification of goods and services;

.....

8. Advertising goods or services with intent not to sell them as advertised....

.....

14. Using any other deception, fraud, false pretenses, false promise, or misrepresentation in connection with a consumer transaction:....

## STATEMENT

The facts and procedural history of this case are set out in the petitioners' original petition for writ of certiorari, the denial of which is the subject of this Petition for Rehearing.

## ARGUMENT

**The Virginia State Courts Denied The Petitioners Due Process Of Law When They Unexpectedly And Without Fair Warning Repudiated The Petitioners' Claims That The Respondents, Acting In Concert, In Breach Of Express Warranty, Committed Frauds, And Violated The Virginia Consumer Protection Act In The Marketing, Selling And Building Of The Petitioners' Home.**

The petitioners request rehearing of the denial of their petition for writ of certiorari (PWC) pursuant to Supreme Court Rule 44.2. This request is made because in their original petition, the petitioners for the sake of brevity,



focused only on the Virginia state courts' inexplicable and unexpected repudiation of Virginia Code Section 50-73.98's language recognizing the liability of a partnership created by estoppel as denying them due process of law.

However, left unaddressed by the petitioners' original petition for writ of certiorari was their further claim that the Virginia state courts' denied them due process of law when they inexplicably and without fair warning ruled that none of the respondents, while furthering the partnership business, could be held liable for their Breach of Express Warranty and violations of the Virginia Consumer Protection Act, and/or for their fraudulent, actual, and/or constructive fraud when they fraudulently, willfully, and/or intentionally misled the petitioners about the cost of house (App.11a) and the quality and workmanship of their home; then failed delivering the quality of home the petitioners paid for (APP.10a-15a) and failed to install the Radon mitigation system as promised (App.5a&5b), affirmatively concealing this fact (App.19-20;58-60) from the petitioners knowing how harmful this may be to any human beings.

B&E also intentionally made misleading statements that petitioners could not repudiate the agreement after certain lots were made unavailable to them or when certain models could not be built; that their lot would be flat and private when in fact it was sloped and lacked privacy (App.16a&17a); that utility lines would be buried when in fact they were installed above ground; that it operated without a contractor's license (App. 28-30); when it prematurely delivered the home to the petitioners two months before it was finished (App. 37).

**The petitioners believe that the above claims are important enough to warrant the grant of their Petition for Rehearing, not just only for them but for other consumers similarly situated and may make transactions for construction of their homes, rely on the partnership and other advertisements made by B&E to the public (App. 6a-8a), like the petitioners.**

The petitioners paid at least \$115,833 more because the B&E operated the business without license in the public and the B&E gave incorrect cost to the petitioners. The petitioners actually signed to the contract to purchase a used (less than one year old) B&E Ashmont model (the Alternative) from the home owner for \$500,000 **on 9 May 2000** (APP. 16a) but offered the price reduction to \$495,000 (APP. 3&4) when the petitioners withdrew their contract to purchase their home from B&E. B&E also provided incorrect cost to at least one of their neighbors. The petitioners signed B&E's contract **on 20 May 2000**.

In the first place, the petitioners alleged that the Virginia general partnership known as the respondent Basheer and Edgemoore ("B&E") advertised and marketed itself and its four other respondent partners as specialists in the construction, sales and financing of luxury residential homes in suburban Virginia.. They asserted that B&E violated the Express Warranty and, the Virginia Consumer Protection Act (Va. Code Sections 59.1-196 *et seq.*) when it intentionally misrepresented the petitioners' rights under the Home Warranty, refused to perform work called for thereunder, required the petitioners to waive their rights under the Warranty, refused to repair the petitioners' listing of defects, and refused to conduct a final walk-through inspection without insisting on a waiver of petitioners' rights(App. 18-19;62). The result was a Home Warranty which had no value.

Consistent with the Breach of Express Warranty, the petitioners under Count I ask an award of damages against B&E and other Defendants, except B&E/Southampton LLC. The petitioners dismissed the case against the LLC due to expenses that would occurring for expert witness and trial including attorney's fee that may cost at least \$15,000, but the Warranty was not worth more than \$1,000, and the LLC has lack of resources, if any to repair defects, etc.

Consistent with the Consumer Protection Act, the petitioners under Count II asked for an award of damages to compensate them for the difference in value between the home B&E

promised and the home it actually delivered and for the money they spent in attempting repairs in order to put the home in the condition B&E represented it would be in at the time of closing(App. 20-21). In addition, for each violation of the Act, they sought an award of the greater of \$1,000 or three times their actual damages incurred together with their attorney's fees and costs(App. 21).

In Count III, the petitioners relied upon all of these material misrepresentations by B&E to allege that but for this fraud, B&E would not have been able to make the sale(App. 21-24). They sought compensatory damages and \$350,000 in punitive damages from all the respondents for this fraudulent inducement(App. 24). The petitioners further claimed in Count IV and V that all of the respondents committed actual and/or constructive fraud when they failed to install a Radon mitigation system as promised and then concealed this fact from the petitioners with measured Radon levels four times the maximum allowable safe levels as established by the EPA(App. 24-28). As a result of B&E's actual and/or constructive fraud, the petitioners have been forced to live in a home with unsafe levels of Radon, were denied the use and enjoyment of a substantial portion of their home, sustained severe emotional and mental distress, suffered monetary losses caused by installing a Radon mitigation system themselves with Mrs. Craig suffering physical injury in the course of making these repairs as well as a precancerous growth requiring surgery and a noticeable loss of hair(App. 26:28:57). They sought compensatory damages in the amount of \$500,000, punitive damages of \$350,000 and their costs, expenses and attorney's fees(App. 26:28).

Despite established law that upon demurrer such allegations are taken as true and read with every deference to the petitioners, *Ward's Equip. v. New Holland North Am.*, 493 S.E.2d 516, 518(Va.1997), the Virginia courts inexplicably sustained the demurrers of the respondents to Count II's allegations of violations of the Consumer

Protection Act because the petitioners' allegations were not specific enough, disregarding the petitioners' two letters (App. 16a & 17a) sent to the B&E identifying specific defects, especially for yard slopes; also provided at least two inspection reports performed by certified home inspectors (App. 32a, PWC). The B&E and other respondents also know the degree of code-violated yard slopes because they spent over 30 minutes in the petitioners' yards in the previous day they made the hearing on the motion. In addition, they ruled that paragraph 19's merger clause in the agreement bars relief for fraud since the petitioners acknowledged therein that they had not relied upon any other representations outside of the contract. The petitioners were actually relied on the B&E's advertisements, their brochures, and their correspondence before, during, and after signing of the contract as stated above.

One of the brochures that B& E provided to the petitioners before and was available during and after the signing of the contract states "**Basheer & Edgemore is a Partnership of Diane Cox Basheer Communities and Edgemore Homes, offering over 40 years of experience ... With over 5,000 homes....**" (App. 6a-8a). At least three letters and one of the envelopes that the B&E sent to the petitioners also states as "*A Partnership of Diane Cox Basheer Communities And Edgemore Homes*" (App. 3a, 3b, 3c).

As for the respondents' actual and constructive fraud claims under Counts IV and V, the Virginia courts ruled that there was no causal connection between the alleged fraud and the severe emotional and mental distress suffered by Mrs. Craig in spite of the physical injury she sustained in the course of making repairs. Mrs. Craig had severe allergic reactions, a precancerous growth which required surgery, a persistent cough for almost two years and a noticeable loss of hair (App. 57) and other problems as stated the above.

In sustaining the demurrers, the Virginia courts have employed an unforeseen reading of Virginia Consumer

Protection Act and their own decisions on fraud and constructive fraud. This unfair reading of the petitioners' complaint is "indefensible by reference to the law which had been expressed prior to the conduct in issue," *Bouie v. City of Columbia*, 378 U.S. 347, 354(1964); and it is so far beyond what a "fair reading" of the Virginia Consumer Protection Act and the relevant decisional law would permit as to constitute a denial of due process of law. *Id.* at 354-355.

**The Fraud Counts.** By its home models, advertisements, correspondence and dealings with the petitioners, B&E in order to make the sale promised the petitioners before and after they executed the contract that their home would be habitable, constructed in a workmanlike manner and free of defects(App. 53-56:66). Instead, their home was none of these things. It was unsafely and defectively built; it had unsafe levels of Radon; and the petitioners have been denied the use and enjoyment of a substantial portion of their home, have sustained severe emotional and mental distress, have suffered monetary losses caused by installing a Radon mitigation system themselves with Mrs. Craig suffering physical injury including a precancerous growth requiring surgery and a noticeable loss of hair (App. 26;28:57-60;64-65). The petitioners' expense occurred over **\$156,149.35** for attorneys' fee, home inspection reports, printing jobs, and filing fees for the Courts, not including repair costs that they already paid and would occur to receive justice.

In Virginia, a misrepresentation, the falsity of which will afford ground for an action for damages, must be of an existing fact, and not the mere expression of opinion. *Mortarino v. Consultant Eng'g Servs.*, 467 S.E.2d 778, 781(1996). *Saxby v. Southern Land Co.*, 63 S.E. 423, 424 (1909). Additionally, "fraud must relate to a present or pre-existing fact, and cannot ordinarily be predicated on unfulfilled promises or statements as to future events." *Patrick v. Summers*, 369 S.E.2d 162, 164(1988) quoting *Soble v. Herman*, 9 S.E.2d 459, 464(1940). However, when B&E through its home models, advertisements, brochures,



correspondence (App. 3b and 3c) and dealings with the petitioners asserted the then present workmanlike construction of their new homes, inducing them to execute a contract and to make a final purchase, these were a representation as to the **present** quality and character of their work "and is clearly a representation of facts and not a promise as to something to be done in the future....Whether a [house] is in the condition represented is factual, not promissory." *Packard Norfolk, Inc. v. Miller*, 95 S.E.2d 207, 211(1956). *Accord Blair Const., Inc. v. Weatherford*, 485 S.E.2d 137, 139(1997); *Mortarino, supra*.

B&E's representations to the petitioners about the present quality and character of their workmanship were specific representations of the present quality and character of the new house and were therefore actionable under Virginia law either for fraud, *Lloyd v. Smith*, 142 S.E.2d 363, 365 (1928), or for constructive fraud, *Tate v. Colony House Builders*, 508 S.E.2d 597, 599-601 (1999). Contrast *Kuczmanski v. Gill*, 302 S.E.2d 48, 50(1983).

Having alleged that B&E fraudulently induced them into entering the contract and the final purchase of their home, the petitioners were not barred under Virginia law by the doctrine of merger from proving their case since "[w]hen fraud in the procurement of the written contract is pleaded, parol evidence tending to prove fraud is admissible," *George Rohberecht Seafood v. Maitland Bros.*, 255 S.E.2d 682, 683(1979) quoting *Stevens v. Clintwood Drug Co.*, 154 S.E. 515, 518(1930), and the fact that such a party plans to rely upon such evidence "would not render the [pleading] demurrable." *Id.* quoting *Larchmont Properties v. Cooperman*, 80 S.E.2d 733, 738(1954). *Accord Miller v. Reynolds*, 223 S.E.2d 883, 885(1976). Thus, Virginia law uniformly recognizes that fraud destroys all consent, vitiates each contract it touches and does not prevent the petitioners from proving now their allegations that B&E fraudulently induced them to enter into this contract.

Having alleged that B&E fraudulently induced them into



entering the contract, the petitioners were not barred under Virginia law by the doctrine of merger from proving their case since “[w]hen fraud in the procurement of the written contract is pleaded, parol evidence tending to prove fraud is admissible,” *George Robberecht Seafood v. Maitland Bros.*, 255 S.E.2d 682, 683(1979) quoting *Stevens v. Clintwood Drug Co.*, 154 S.E. 515, 518(1930), and the fact that such a party plans to rely upon such evidence “would not render the [pleading] demurrable.” *Id.* quoting *Larchmont Properties v. Cooperman*, 80 S.E.2d 733, 738(1954). *Accord Miller v. Reynolds*, 223 S.E.2d 883, 885(1976). Thus, Virginia law uniformly recognizes that fraud destroys all consent, vitiates each contract it touches and does not prevent the petitioners from proving now their allegations that B&E fraudulently induced them to enter into this contract.

***The Consumer Protection Act.*** The Virginia Consumer Protection Act (VCPA), Virginia Code Sections 59.1-196 *et seq.*, is remedial legislation aimed at promoting fair and ethical standards for suppliers when dealing with the consuming public. *Wilkins v. Peninsula Motor Cars, Inc.*, 587 S.E.2d 581, 584(2003). It evinces Virginia’s strong public policy interest in protecting its consumer citizenry from fraud in the marketplace. The VCPA makes it unlawful for any supplier in connection with a consumer transaction to commit the “fraudulent acts or practices...[of] using any deception, fraud, false pretense, false promise, or misrepresentation...”

Fraud under VCPA need not be pled with the same kind of particularity as common law fraud. *Nigh v. Koons Buick Pontiac GMC, Inc.*, 143 F. Supp. 535, 553-554(E.D. Va. 2001)(applying Virginia law), *aff’d* 319 F.3d 119(4th Cir. 2003), and the petitioners’ allegations were sufficient to meet its standard. *Id.* There is no exemption in the VCPA for fraud committed in the sale of new homes; and under its provisions, B&E fraud together with its failure to install a Radon mitigation system and then affirmatively conceal this fact from the petitioners is actionable because “concealment,

whether accomplished by word or conduct, may be the equivalent of a false representation" under the VCPA. *Lambert v. Downtown Garage, Inc.*, 553 S.E.2d 714, 717-718(2001) quoting *Spence v. Griffin*, 372 S.E.2d 595, 599(1988).

Thus, Virginia law uniformly recognizes that the VCPA encompasses precisely the kind of fraud/misrepresentation by B&E which the petitioners have alleged here. The Virginia courts' inexplicable and unexpected failure to acknowledge this fact denied the petitioners—indeed, all those similarly situated consumers—the remedies provided by the VCPA and is a denial of due process of law.

### PRAYER

The petitioners' plea the Supreme Court of the United States to hear this case is in the public interest so that entities who conduct similar business with consumers will be deterred from this conduct. Entities would not repeat the same negligence and commit false promises, falsely advertise and fraudulently and intentionally misrepresent their product. This also allows the petitioners and others in similar circumstances to be protected under the above laws and to relieve from their financial burdens and receive their justice and constitutional and civil rights as the citizens of the United States; The petitioners have persisted in this case for these reasons.

For all of these reasons identified herein, this Court should grant this Petition for Rehearing and then issue a writ of certiorari to the Supreme Court of Virginia in order to review its decision and redress the denial of petitioners' due process rights or provide the petitioners with such other relief as is fair and just in the circumstances.

Respectfully submitted,

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**CERTIFICATION**

We, Stephen V. Craig and Un Sun H. Craig, petitioners herein, declare under the penalties of perjury that this Petition for Rehearing is made in good faith and is not filed for any purposes of delay.

Signed this 20<sup>th</sup> day of March, 2006, at Springfield, Virginia.

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Steven V. Craig

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Un Sun Craig

March 20, 2006